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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, *et al.*,
Cross-Petitioners,

v.

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, *et al.*,
Petitioners.

CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM L. TAYLOR
CENTER FOR NATIONAL POLICY REVIEW
Catholic University Law School
Washington, D.C. 20064
202/832-8525

JOHN WOOD
BAMBERGER AND FEIBLEMAN
45 North Pennsylvania
Indianapolis, Indiana 46204

Attorneys for Cross-Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Where lower courts have found an inter-district violation of the Fourteenth Amendment causing area-wide racial segregation between the public schools of a central city district and those of suburban districts within the city, does a remedy limited to the one-way transfer of black students from the central city to suburban districts meet the constitutional test of providing relief commensurate with the scope of the violation where:

a) the one-way character of the plan places inequitable burdens on black students, and

b) the Court of Appeals has found that the most closely tailored relief for the inter-district boundary violation would be consolidation of school districts within the city,

and no compelling justification has been advanced for the limitations placed on the remedy?

LIST OF PARTIES

Cross-petitioners are the Board of School Commissioners of the City of Indianapolis, together with its elected members and appointed Superintendent of Schools, in their official capacities, referred to herein as "IPS." Petitioners not listed in the caption are the Metropolitan School Districts of Lawrence, Warren, Wayne and Decatur Townships, Marion County, Indiana; the Franklin Township Community School Corporation, Marion County, Indiana; the School Town of Speedway, Marion County, Indiana; the School City of Beech Grove, Marion County, Indiana; Otis R. Bowen, as Governor of the State of Indiana; Theodore L. Sendak, as Attorney General of the State of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; and the Indiana State Board of Education, a public corporate body. Other parties to the proceeding in the United States Court of Appeals are the United States of America, Donny Brurell Buckley and Alycia Marquese Buckley; the Metropolitan School Districts of Pike and Washington Townships, Marion County, Indiana; the Metropolitan Development Commission of Marion County, Indiana; and the Housing Authority of the City of Indianapolis, Indiana.

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CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Cross-petitioners, the Board of School Commissioners of the City of Indianapolis, Indiana, *et al.*, (IPS), pray that the Court grant this cross-petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 29, 1980.

OPINIONS BELOW

The opinions below on which this cross-petition is based are:

Opinions of the Court of Appeals, not yet reported (JA 1) affirming in part and vacating in part the

judgment of the district court entered July 9, 1979 (JA 130)[1].

Opinion of the district court dated July 11, 1978, 456 F.Supp. 184 (JA 84).

Opinion of the district court on limited remand relating to remedy, dated April 24, 1979, unreported (JA 101).

Prior opinions in the case relevant to this appeal are, in chronological order, as follows:

Opinion of the district court dated August 17, 1971, 332 F.Supp. 655 (IPS A. 1), affirmed by opinion of the Court of Appeals dated February 1, 1973, 474 F.2d 81.

Opinion of the district court dated July 20, 1973, 368 F.Supp. 1191 (IPS A. 10) supplemental opinion of the district court dated December 6, 1973, 368 F.Supp. 1223 (IPS A. 44), vacated and remanded by opinion of the Court of Appeals dated August 21, 1974, 503 F.2d 68.

Opinion of the district court dated August 1, 1975, 419 F.Supp. 180 (SA 36), affirmed by opinion of the Court of Appeals dated July 16, 1976, 541 F.2d 1211 (SA 1).

Opinion of the Court of Appeals dated February 14, 1978, remanding the case to the district court, 573 F.2d 400 (JA 54).

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[1] This cross-petition seeks review of separate issues arising from the judgment of the Court of Appeals which is also the subject of petitions previously filed by other parties in Docket Nos. 79-1975, 79-2001 and 79-2067. An appendix is filed with this cross-petition and cited herein as "IPS A." Petitioners adopt by reference the separately bound Joint Appendix (cited as JA) previously filed by the petitioners in Nos. 79-1975 and 79-2001, which includes the judgments sought to be reviewed (JA 130, JA 136), and also the separate supplemental appendix (cited as "SA") filed with the petition in No. 79-2067.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals sought to be reviewed by this petition was entered April 29, 1980. No petition for rehearing was filed. This court has jurisdiction to review the judgment under 28 U.S.C. ¶ 1254(1) and 28 U.S.C. ¶ 2101(c).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves interpretation and application of Section 1 of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Certain statutes of the State of Indiana which are relevant to issues presented by other petitioners seeking review of the judgment below, but which are not relevant to issues presented in this petition, are described in the petitions in Nos. 79-1975, 79-2001 and 79-2067.

STATEMENT

Since 1969, the City of Indianapolis has been governed by a unified city-county council which has jurisdiction over all the territory in Marion County, Indiana.

Within this unified area, however, there are 11 separate school corporations. In 1970, IPS, the largest of

these school districts, while enrolling less than 60% of the total number of public school students had more than 97% of all black students in the city. (JA 6). While petitioner Lawrence, et al. notes (Lawrence Petition pp. 7-8) that the black student population of the non-IPS school districts has increased somewhat since 1970, almost all of this increase has occurred in the Pike and Washington school corporations, two districts not involved in the current proceedings (JA 118). Even including Pike and Washington, the suburban school corporations remain 94% white while the enrollment in IPS has risen to more than 47% black. (JA 109-112).

The highly segregated character of public schools in Marion County—extreme even when compared to other metropolitan areas [2]—did not come about accidentally or through the exercise of free choice by black and white citizens. Rather, the lower courts have found that it is the product of a series of discriminatory actions in which state officials have been implicated either directly or indirectly and which were carried out over a long period of time.

Violation. In its 1971 decision, the district court, in holding that IPS had maintained a racially dual school system at the time of the *Brown* decision and that it had not dismantled the dual system, found that the State of Indiana, unlike many other Northern and Western states, had for long periods of time required segregated schools by state law and official policy. (IPS A 5-8). In its

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[2] In Marion County 89% of all black students attending public schools are in IPS and 11% in the suburbs. Nationally, of blacks who live in metropolitan areas, 74% reside in central cities and 26% live in the suburbs. U.S. Bureau of the Census, Current Population Reports, Series P-20, No. 336 and Statistical Abstract of the United States, 1977.

1973 decision [3], the district court determined that state officials ultimately charged under Indiana law with the responsibility of operating the public schools had caused and promoted segregation within IPS and, even after the state segregation policy had been officially dropped, had done "next to nothing" to dismantle the dual school system. (IPS A 29). On appeal, this holding was af-

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[3] The inter-district issues in this case were first litigated after the 1971 district court decision when respondents Buckley intervened and joined as additional defendants other school districts in Marion County and the Indianapolis metropolitan area. (The case was originally commenced as an intra-district action by the United States pursuant to § 407(a) and (b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6(a) and (b)). In their amended complaint based on 42 U.S.C. §§ 1983 and 1988 and asserting jurisdiction under 28 U.S.C. § 1343(3), the Buckleys alleged inter-district violations and prayed for relief "including if necessary" consolidation or merger of the defendant school systems. IPS later joined the effort to obtain inter-district relief and in 1978 sought to realign itself as a party plaintiff and to obtain a full evidentiary hearing on issues relating to the nature and scope of the inter-district violation. From a denial of this motion, IPS appealed and obtained a limited remand for hearings on "which alternative remedy . . . is necessary and equitable to overcome the combined effect of all the constitutional violations previously found by the district court." Unreported Opinion, August 11, 1978, p. 2 (7th Cir.).

Although the District Court has been reluctant to order complete intra-district relief while the inter-district issues were pending (IPS A 45), partial relief has been implemented and IPS and the United States have agreed to complete the process in September 1980. Moreover, the Court of Appeals directed the District Court to give prompt attention to formulating more comprehensive intra-district relief for September, 1980 regardless of the status of inter-district remedy (JA 28). Thus intra-district remedy is not involved in these proceedings.

firmed. 503 F.2d 68, 80 (7th Cir., 1974), *cert. denied* 421 U.S. 929 (1975).

In addition, the district court's 1971 opinion set out a number of historical practices of racial discrimination in housing that had contributed to the growth of segregated neighborhoods and schools in the Indianapolis area. These included a racial zoning ordinance ultimately declared unconstitutional by a state court, the widespread use of racially restrictive covenants which were "routinely enforced" until 1948, and police toleration or enforcement of practices, including violence, designed to exclude blacks from white neighborhoods. (IPS A 2-4).

In its 1971 and 1973 opinions, the district court specifically found that these housing practices, along with segregative public housing actions, were principally responsible for the racial disparities in housing and school enrollments that existed in Marion County (IPS A 8-9, 31-32), a finding later affirmed by the Court of Appeals. (SA 22-24).

After a Court of Appeals remand for reconsideration in light of this court's decision in *Milliken I* and further evidentiary hearings, the district court in 1975 held that there were two inter-district violations of the Fourteenth Amendment within the meaning of *Milliken I*: 1) the 1969 state legislative actions which confined IPS to its pre-1969 boundaries (coterminous with the old city of Indianapolis) when municipal governments were being replaced by a unified county-wide government (Uni-Gov) (SA 40-41) and 2) a series of state actions in the 1960s confining public housing, whose residents were almost exclusively black, to areas within the boundaries of IPS. (SA 46). The holding was based in part on findings that Marion County officials had sought to discourage black people from purchasing or renting homes in the suburbs and that the exclusion of public housing from suburban areas of Marion County and the failure to consolidate school districts were based on such suburban resistance.

(SA 39-40). See also, IPS A 32, 8-9, 29-30. On appeal, the Court of Appeals affirmed the findings of the district court and the remedy ordered as in accord with the principles of *Milliken I.* (SA 26).

After this court's remand (429 U.S. 1068) for reconsideration in light of *Arlington Heights* and *Washington* v. *Davis* and a Court of Appeals remand (JA 54) with specific instructions, the district court in 1978 made new findings with respect to racial intent. It held 1) that "the action(s) of the General Assembly were done, at least in part, with the racially discriminatory intent and purpose of confining black students in the IPS school system to the 1969 boundaries of that system, thereby perpetuating the segregated white schools in suburban Marion County" (JA 92) and 2) that "the action of . . . official bodies in locating [public] housing projects within IPS, as well as the opposition of the suburban governments to the location of public housing within their borders, were racially motivated with the invidious purpose to keep the blacks within pre-Uni-Gov Indianapolis and IPS, and to keep the territory of the added suburban defendants segregated for the use of whites only." (JA 93-94).

The Court of Appeals sustained these findings of racial intent completely (JA 11, 16) except with respect to two districts, Speedway and Beech Grove, where it called for further proceedings to determine whether the districts were affected by the violation. (JA 24-27). In doing so, the Court determined that the plaintiffs had met their burden of proving systemwide discrimination. (JA 21).

Remedy. While the violation found by the courts below is pervasive and systemwide in character, the remedy ordered is extremely limited. In 1975, the district court, in order to raise the proportion of black students in suburban schools to 15% of their total enrollment, ordered the transfer of approximately 9,500 IPS students to several of the suburban districts. (SA 44-46). In hearings held after the 1978 remand, cross-petitioner IPS

offered as alternatives to the relief previously ordered a comprehensive desegregation plan (Plan C) and a more limited "two-way" plan (Plan B) calling for the reassignment of a number of suburban students to IPS equal to the number of suburban students to be transferred to IPS.[4] The United States suggested that an appropriate

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[4] In support of these plans, IPS presented extensive evidence including the testimony of a nationally renowned demographer that the numerous intra-district school violations (including boundary violations, discriminatory site selection, discriminatory use of busing, faculty and staff discrimination and segregation, and the use of optional attendance zones) had probable inter-district effects on the racial composition of suburban public schools and neighborhoods; the testimony of a housing expert on the continuing segregative effects on housing patterns of past discriminatory housing practices; and other evidence (presented by the United States as well as IPS) that the pre-existing housing violation had been compounded and its effects exacerbated by new discriminatory acts by public officials. But the district court chose not to credit the testimony on the inter-district effects of intra-district school violations (JA 113), made no findings despite a specific Court of Appeals request (JA 69) on the continuing segregative effects of past housing practices and discounted evidence of new housing violations on grounds that it "may well lead to further proceedings against HACI, but is otherwise of little help in arriving at an appropriate remedy." (JA 109).

The Court of Appeals held that the district court had discretion to reject the expert testimony on inter-district effects of intra-district discrimination (JA 16-18) and that the district court's failure to make findings on the current impact of past discriminatory housing practices was not clear error. (JA 12-13). The Court did not comment on the district court's discounting of evidence of new housing violations.

In view of the fact that the Court of Appeals found a systemwide violation even in the absence of the evidence cited above, cross-petitioner does not seek a review of these evidentiary rulings.

remedy might include annexation or expansion of the boundaries of IPS to the city borders. (JA 103). The district court, however, viewed the effects of the inter-district violations as circumscribed by the public housing violation, which the court attempted to quantify mathematically to a number approaching the transfers previously ordered. (JA 105-107, 117-118). On this reasoning the court again determined that a reassignment plan would be limited to the relief the court had ordered before hearing evidence on the subject in 1975 and 1978, adjusting the plan only to take into account the slightly reduced numbers of transfers needed to bring each suburban district up to 15% black enrollment. (JA 118).

On appeal, the Court of Appeals found that the district court made numerous errors in its treatment of remedy. It held that the district court erred: 1) in misconstruing *Dayton I* to require that a party prove, even where a systemwide violation has been established, precisely what effect each individual act of discrimination had on the current pattern of segregation (JA 20-21); 2) in discounting the effect of the state legislative violation on grounds that Uni-Gov would never have been enacted if expansion of school boundaries was required (JA 21-22); and 3) in holding that it had no power to order a suburban child to be transferred out of its own school corporation. (JA 23-24). Moreover, the Court of Appeals found that "[t]he most closely tailored remedy would likely be one that would allow IPS to expand to the city borders." (JA 22).

Despite these errors, the Court of Appeals determined that it was within the discretion of the district court to circumscribe the remedy. The failure to order expansion of IPS to the city borders, the remedy the Court viewed as "most closely tailored to the violation," could have been based on the fact that it "would have been far more intrusive into local political processes" (JA 22), despite the fact that the district court had not made findings on this question. The limitation of inter-district

remedy to one-way transfers was deemed appropriately based on the fact that white students *within* IPS would be reassigned and on statements the district court had made about "generally better facilities in the outer districts" and "closing of obsolete schools" within IPS [5] (JA 23), despite the fact that the decision was colored by the district court's erroneous view that it lacked authority to order two-way relief and the Court of Appeals' "concerns about possible inequities of the plan." (JA 23).

Accordingly, notwithstanding its finding of a system-wide violation throughout Marion County, the Court of Appeals rejected the efforts of cross-petitioner to secure a broader remedy and sustained the district court's limited one-way plan.

REASONS FOR GRANTING THE WRIT

At least since 1971, this Court has consistently expounded the principle that in school desegregation cases, "the nature of the violation determines the scope of the remedy" *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). The principle applies not only to school systems where racial segregation was statutorily mandated at the time of *Brown*, but to systems, such as the one here, where statutory authorization for segregation was abandoned shortly before *Brown* and to those where it never existed at all. *Keyes* v. *School*

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[5] This was an apparent reference to a statement of the district court in its 1973 opinion that data showed that 21 predominantly black IPS elementary schools "are substantially out of line with the requirements of present Indiana law and regulations establishing minimum acreage requirements for elementary schools" and to a speculation in the same opinion that older IPS schools would probably "afford inadequate educational plant facilities viewed in the light of current standards." (IPS A 57-58). The district court repeated in its 1979 opinion that the one-way plan would "afford [IPS] the opportunity to discontinue obsolete buildings." (JA 114-115).

District No. 1, Denver, 413 U.S. 189 (1973). In those systems as well, proof of a systemwide violation requires a systemwide remedy, one that desegregates the "entire system 'root and branch' " *Keyes* at 213, citing *Green* v. *County School Board of New Kent County*, 391 U.S. at 438 (1968).

On at least two occasions since 1971, this Court has set aside remedies which it determined exceeded the scope of the violation found by the courts below. *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Dayton Board of Education* v. *Brinkman* [*Dayton I*], 433 U.S. 406 (1977).

This cross-petition presents the obverse issue, whether a remedy which *falls short* of the violation found by the lower courts, one which the court below acknowledged was not "most closely tailored" to redress the violation (JA 22) and contained "possible inequities" (JA 23) in its one-way character, can pass constitutional muster. While this Court has not yet had occasion to rule directly on the issue posed, the principles it has enunciated strongly suggest that the circumscribed remedy here ordered for a pervasive violation cannot be permitted to stand.

As recently as 1979, this Court reaffirmed the basic rule that "a remedy imposed by a court of equity should be commensurate with the violation ascertained" *Columbus Board of Education* v. *Penick*, 443 U.S. 449 at 465, adding in the words of *Swann* and *Green* that where a racially discriminatory school system has been found to exist the obligation is "to come forward with a plan that promises realistically to work . . . until it is clear that state imposed segregation has been *completely* removed." *Id.* at 459 [emphasis supplied]. Moreover, while this Court has not yet ruled directly on the question of whether a plan exempting large numbers of white students from reassignment and placing the burden of transfer almost entirely on black students is an appropriate remedy for a systemwide violation, it has con-

sistently sustained two-way remedies in major urban cases arising in the North as well as the South. See *Swann, supra; Columbus, supra; Dayton Board of Education* v. *Brinkman* [*Dayton II*], 443 U.S. 526 (1979).[6]

The limitations placed on remedy by the court below also bring the Seventh Circuit into conflict with decisions of the Third, Fifth, Sixth and Eighth Circuits which have all held at a minimum that plans which call for the closing of black schools and the transfer of disproportionate numbers of black students bear a heavy burden of justification. See *Evans* v. *Buchanan*, 582 F.2d 750, 760 (3rd Cir., 1978), *cert. denied* —— U.S. ——, 64 L.Ed. 2d 278 (1980); *Lee* v. *Macon County Board of Education*, 448 F.2d 746, 753 (5th Cir., 1971); *Arvizu* v. *Waco Independent School District*, 495 F.2d 499, 508 (5th Cir., 1974) *rehearing denied* 496 F.2d 1309 (1974); *Kelley* v. *Metropolitan City Board of Education of Nashville*, 463 F.2d 732, 751-752 (6th Cir., 1972) (McCree, J., concurring) *cert. denied* 409 U.S. 1001 (1972); *NAACP* v. *Lansing Board of Education*, 559 F.2d 1042, 1052 (6th Cir., 1977); *Haney* v. *County Board of Education of Sevier County*, 429 F.2d 364 (8th Cir., 1970).[7]

At one level, these decisions seek to place appropriate limitations on the unbridled exercise of discretion. As the Court of Appeals said in *Evans*:

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[6] *McDaniel* v. *Barresi*, 402 U.S. 39 (1971), relied on by the district court (JA 115), involved a challenge by white parents to a voluntary plan and did not address the issue of two-way transfers.

[7] Even in cases where black schools are closed or one-way transfers are adopted not to cure an unconstitutional condition but as a voluntary matter, some degree of justification of the unequal burdens imposed is required. See *Parent Association of Andrew Jackson High School* v. *Ambach*, 598 F.2d 705, 718 (2nd Cir., 1979); *Johnson* v. *Board of Education of City of Chicago*, 604 F.2d 504 (1979), *cert. granted* 48 U.S.L.W. 3852 (June 24, 1980).

> The Supreme Court teaches that the exercise of discretion involves certain functional parameters: "Discretion imports not the court's 'inclination, but its judgment; and its judgment is to be guided by sound legal principles.' Discretion is vested . . . to allow the most complete achievement of the objectives . . . attainable under the facts and circumstances of the specific case." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 770-771, quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975). 555 F.2d at 378.

See also, *Morrilton School District No. 32* v. *United States*, 606 F.2d 222, 229 (8th Cir. 1979) *cert. denied* —— U.S. ——, 62 L.Ed. 2d 758 (1980). *Cf. Dayton I*, 433 U.S. at 409-410.

At a more fundamental level, the question of whether lower courts have unfettered discretion to decree one-way remedies for pervasive violations goes to the heart of the issue of invidious racial distinctions which was at stake in *Brown*. As Judge McCree said in *Kelley*:

> Without a compelling justification, adoption of a plan that places a greater burden of accomplishing integration on black students and their parents is impermissible, whether this be phrased in terms of an equal protection violation . . . or in terms of an abuse of the court's discretion in fashioning an equitable remedy to rectify the effects of past injustice. 463 F.2d at 751.

Part of the evil of such one-way programs is that they cause the burden "to fall disproportionately on Blacks" and have "the effect of keeping the 'neighborhood school policy, a reality for whites, while making it chimerical for Blacks" *NAACP* v. *Lansing Board of Education*, *supra* at 1052. And, as the Third Circuit said in *Evans*, such a plan "carries with it the tacit assumption that only—and that all—black students benefit from transferring to a white environment, and not *vice versa*." 582

F.2d at 760. See also, *Brice* v. *Landis*, 314 F.Supp. 974 (N.D. Cal., 1969), where the district court said that under one-way transfers "the minority children are placed in the position of what may be described as second-class pupils." *Id.* at 978.

If, as indicated, plans which heavily burden minority students must bear a heavy burden of justification, the rationalizations for the district court's one-way plan that remained after the Court of Appeals had cleared away the major legal errors do not meet the test. While it is true that some white students were subject to transfer, those transfers were designed *only* to remedy the intra-district violation and were to occur in only one of the nine districts covered by the district court's plan, leaving all of the suburban corporations as limited participants in the plan. Moreover, the transfer of some white students under one aspect of a plan hardly mitigates their exemption from transfer under other portions of the remedy. See *Arthur* v. *Nyquist*, 473 F.Supp. 830, 840 (W.D. N.Y., 1979).

Nor do cursory references, even if capable of substantiation, to "generally better facilities in the outer districts" (JA 23) or "closing of obsolete schools" within IPS (JA 23) provide a convincing justification especially when these factors were not weighed against the economic and psychological harm that inheres in the closing of facilities and loss of student population in the district that will continue to contain the largest number of black students.

Nor can invocation of the rubric of "political intrusiveness" justify the adoption of a remedy which falls substantially short of curing the constitutional violation found. In *Milliken I*, this Court, while calling for appropriate deference to local political autonomy, specifically stated that "[s]chool district lines . . . are not sacrosanct and if they conflict with the Fourteenth Amendment fed-

eral courts have a duty to prescribe appropriate remedies." 418 U.S. at 744. See *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972); *United States* v. *Scotland Neck Board of Education*, 407 U.S. 484 (1972). In the cases which have arisen since *Milliken* in which violations of an inter-district nature have been found, lower courts uniformly have required or approved remedial plans in which the affected districts were consolidated and treated as a single, unified desegregation area for student reassignment purposes. *Evans* v. *Buchanan*, 555 F.2d 373, 381-382 (3rd Cir., 1977), *cert. denied*, 434 U.S. 880 (1977), 582 F.2d 750 (3rd Cir., 1978) (affirming final student reassignment plan in consolidated district), *cert. denied* —— U.S. ——, 64 L.Ed. 2d 278 (1980); *Morrilton School District No. 32* v. *United States*, 606 F.2d 222 (8th Cir., 1979), *cert. denied* —— U.S. ——, 62 L.Ed. 2d 753 (1980); *United States* v. *State of Missouri*, 515 F.2d 1365 (8th Cir. 1975), *cert. denied* 423 U.S. 951 (1975). *Cf. Cunningham* v. *Grayson*, 541 F.2d 538 (6th Cir., 1976), *cert. denied* 429 U.S. 1074 (1977). Consolidation in these cases was required despite its political intrusiveness because, in the words of *Milliken I*, it was the remedy needed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct" 418 U.S. at 746. It was precisely this reasoning that led the court below to conclude that expansion of IPS boundaries was the "most closely tailored remedy".

A final, implicit rationale for the one-way plan is that it will encounter less resistance than a two-way remedy because whites are less opposed to having "their" schools opened to black children than to having their children attend "black schools." But as this Court said in *Brown II*:

> it should go without saying that the vitality of these constitutional principles [those set forth in *Brown I*]

cannot be allowed to yield simply because of disagreement with them. 349 U.S. at 300.

Accordingly, the supposition that a one-way remedy will provide the course of least resistance cannot justify a plan which is both inadequate to redress the adjudicated effects of the inter-district violation and patently discriminatory and unfair to black students.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM L. TAYLOR
CENTER FOR NATIONAL POLICY REVIEW
Catholic University Law School
Washington, D.C. 20064
202/832-8525

JOHN WOOD
BAMBERGER AND FEIBLEMAN
45 North Pennsylvania
Indianapolis, Indiana 46204

Attorneys for Cross-Petitioners

No. 80-129

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, *et al.*,
Cross-Petitioners,

v.

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, *et al.*,
Petitioners.

CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IPS APPENDIX

WILLIAM L. TAYLOR
CENTER FOR NATIONAL POLICY REVIEW
Catholic University Law School
Washington, D.C. 20064
202/832-8525

JOHN WOOD
BAMBERGER AND FEIBLEMAN
45 North Pennsylvania
Indianapolis, Indiana 46204

Attorneys for Cross-Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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APPENDIX

UNITED STATES DISTRICT COURT
S. D. INDIANA
INDIANAPOLIS DIVISION

No. IP 68-C-225

UNITED STATES OF AMERICA,
Plaintiff,
v.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, *et al.*,
Defendants.

Aug. 18, 1971

(Including only 661-665 and 673-674)

C. Housing Policy

Before turning attention to the schools, however, another area of segregation needs mention, and that is in the matter of housing. Just as was the case in Virginia, so in Indianapolis persons of African descent were present from the beginning. It has been recorded that on the very mission which resulted in the location of the new state capitol on the banks of Fall Creek, Governor Jennings was accompanied by a Negro boy known to history only as Bill.[27] More to the point, Ephriam Ensaw, a freed man who worked for wages, settled in the new town, along with various white settlers, even before the surveyors had finished staking the lots.[28] However, by the time the first German and Irish immigrants had been imported in 1836 to work on the Central Canal, most Negroes were to be found in "Colored Town," on the outskirts of the mile square,[29] and were later concentrated in the area around Indiana Avenue.

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[27] Leary, Indianapolis The Story of a City (1970), p. 8 (hereinafter "Leary").

[28] Ibid., p. 13.

[29] Ibid., p. 50.

Segregation in the housing of Negroes in Indianapolis has persisted at least until the date of the filing of this action.[30] As the evidence in this case discloses without conflict, Negroes were discouraged from purchasing homes in predominantly "white" neighborhoods by various methods: white realtors refused to show such homes to Negroes (and no Negro real estate broker was permitted to become a member of the Indianapolis Real Estate Association until 1962), a two-price system was used: a realistic market price to whites and a ridiculously inflated price to Negroes, lending institutions refused to finance homes sought to be purchased by Negroes in "white" areas. Those pioneering Negroes who nevertheless overcame all obstacles and succeeded in purchasing such a home were then harassed by such devices as threatening and obscene telephone calls, stones hurled through windows, neighborhood ostracism, etc.[31] Certain streets and other landmarks, such as Fall Creek, White River, certain railroad tracks, etc., were regarded at different times as barriers to be hurdled by Negroes at their peril.

In addition to pressures of the foregoing type, applied by individual whites, residential segregation was also enforced by law, in many instances. Perhaps the best known method was by means of the racial covenant which, when inserted into a deed or plat of a real estate subdivision, limited ownership of the lot to persons of the white race. As may be noted from a cursory observation of plats recorded in the plat books kept in the office of the recorder of Marion County, many of the better known sub-

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[30] The Civil Rights Act of 1968, Pub.L. 90-284, 82 Stat. 81, 42 U.S.C. §§ 3601 et seq. was not fully effective until December 31, 1969, and its effects have barely begun to be felt.

[31] One who received such treatment was Mr. Grant Hawkins, a graduate of Indiana University, successful businessman, and first Negro member of the School Board. For a more detailed discussion, see Thornbrough, pp. 22-29.

divisions, such as Williams Creek Estates, Broadmoor Estates, Meridian Hills, Highwoods Addition, Forest Hills, Wellington Estates, Fall Creek Highlands, Greenslopes, Wynedale, Ellenberger Plaza, and Meridian-Kessler Terrace, contained such covenants, which were routinely enforced until held unconstitutional in 1948.[32]

As shown by the evidence herein, the City of Indianapolis took official action to enforce segregation in 1926 when the City Council, with only one dissenting vote,[33] adopted General Ordinance No. 15, making it unlawful for any Negro "to establish a home-residence on any property located in a white community or portion of the municipality inhabited principally by white people * * *," or for a white person to commit the same act in a Negro community. The ordinance imposed a fine and imprisonment for violation, and further provided that each seven days maintenance of such a residence would be deemed a separate offense.[34] Passage of the ordinance was noted by The Indianapolis News, then and now one of Indiana's leading newspapers, which stated that "Sincere convictions are represented in the ordinance * * *" and "Patience and forbearance are called for."[35] When the Marion Circuit Court held the ordinance unconstitutional a short time later, The Indianapolis News had a plan of

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[32] The plats of Kessler Park and Crippin's River Park Addition were recorded with racial covenants in 1949, after they had already been held unconstitutional by the Supreme Court in Hurd v. Hodge, 1948, 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187.

[33] The Honorable Edward B. Raub voted in the negative.

[34] The Mayor and most members of the City Council of this period (not including Raub) had been elected with the support of the Ku Klux Klan. For a short summary of the Klan era see Leary, Ch. 23.

[35] The Indianapolis News, editorial, March 16, 1926.

action. "One thing should be done as soon as possible," it editorialized, "and that is to pave the streets in colored neighborhoods, and make them so attractive that there will be no desire to get out of them * * *. The surroundings should be made as good as those in white sections, so that there may be no reason for leaving them." [36] As recently as July 4, 1963, the major Indianapolis newspapers, in their real estate want ad columns, used the designation "for colored," or "col." in describing residential property in certain sections of the city.

It is common knowledge that in many small towns and a few larger ones in Indiana the custom that Negroes were not allowed to stay overnight was so invoidable that it had the force of law and was actually enforced by local officials.[37] Thus today it is noticeable that almost no Negroes are to be found in communities adjoining the School City of Indianapolis. Marion County has three municipalities other than Indianapolis, all contiguous to the School City. Beech Grove, an industrial community of 13,432, has a Negro population of 19. Speedway City, a similar type community, has 68 Negroes out of a total population of 14,951, while Lawrence has 216 Negroes out of a total population of 18,997. Of Marion County's 792,299 residents, 134,474 or 17% are Negro. Of these, approximately 122,086, or 98.5% are confined to the central area served by the defendant School Board.[38]

The Bureau of the Census recognizes approximately 250 standard metropolitan statistical areas in the 1970 census.[39] Such an area is a county or group of contiguous counties which contains at least one city of 50,000 or

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[36] Ibid., November 24, 1926.

[37] Thornbrough, p. 21.

[38] All statistics are based upon the 1970 census.

[39] Bureau of the Budget, Standard Metropolitan Statistical Areas (1967, as supplemented).

more inhabitants and which according to certain criteria, are socially and economically integrated with the central city. The Indianapolis Metropolitan Statistical Area has 1,109,882 inhabitants and includes, in addition to Marion County, the contiguous counties of Boone, Hamilton, Hancock, Hendricks, Johnson, Morgan, and Shelby. The 1970 census figures reflect a total of 2,849 Negroes out of a total population of 317,583 residing in these seven suburban counties, a percentage of 0.897.

D. School Policies to 1949

In early Indiana, as has been seen, the Negro lacked many of the rights which are the ordinary attributes of citizenship. The plain fact is that, although entitled to certain rights under Indiana law, such as the right to own property and the right to personal liberty, Negroes were not considered to be citizens of the State until the adoption of the Fourteenth Amendment to the Constitution of the United States.[40] For this reason, many of the rights conferred upon citizens by the successive Indiana Constitutions were construed as not applying to Negroes.

Thus in an early case it was held that Negro children could not attend school with white children over the protest of a white parent, even if they paid their own tuition.[41] A statute in force in 1861 barred Negroes, mulattoes and the children of mulattoes from admission to the common schools.[42] After the adoption of the Fourteenth Amendment, the General Assembly in 1869 enacted a law providing, for the first time, for the education of Negro children, but providing also for them to be organized into separate schools. The statute provided that if there were not a sufficient number of such children within attending

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[40] Cory, et al. v. Carter, 1874, 48 Ind. 327.

[41] Lewis v. Henley, et al., 1850, 2 Ind. 332.

[42] Draper, Trustee, et al. v. Cambridge, 1863, 20 Ind. 268.

distance to form a school in one district, several districts could be consolidated; and if there were not enough to be consolidated within a reasonable distance, "the trustee * * * shall provide such other means of education for said children as shall use their proportion, according to members, of school revenue to the best advantage." [43]

The case of Cory et al. v. Carter [44] was commenced by Carter, a Negro parent of school age children, against the school officials of Lawrence Township, Marion County, to compel them to accept his children as pupils in the "white" district school, such officials having failed to provide any school in that or any adjoining district near enough for his children to attend, whereby they were denied the right to attend any school at all. He secured an order of mandate from the Marion Superior Court, but the Supreme Court reversed, holding that under the 1869 Act Negro children were not entitled to admission in common schools provided for the education of white students. This holding was reaffirmed in subsequent cases.[45]

In about 1868 Indianapolis erected a new school house and, anticipating the 1869 legislation, assigned the old building on Market Street for the education of Negro children.[46] A separate elementary school was opened there in the fall of 1869. Thus at the very inception of public education for the Indianapolis Negro child, he was segregated by virtue of State law. As will be demonstrated later, *de jure* segregation in the elementary

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[43] Acts 1869, Ch. 16, § 3, p. 41.

[44] Note 40, *supra*.

[45] Greathouse v. Board of School Com'rs, 1926, 198 Ind. 95, 151 N.E. 411; State ex rel. Mitchell v. Gray, et al., School Trustees, 1883, 93 Ind. 303; State ex rel. Oliver, et al. v. Grubb, Trustee, 1882, 85 Ind. 213.

[46] Leary, p. 118.

schools continued virtually without change until this action was filed, one hundred years later. The situation with respect to high schools has taken a more erratic course.

Indianapolis's first high school was Shortridge, followed by Emmerich Manual Training and Arsenal Technical. For more than fifty years no separate high school for Negro students was established, and after 1877 school children of both races were permitted to select the high school of their choice, attending on an integrated basis.[47] However, with impetus provided by a petition from the Indianapolis Chamber of Commerce, the School Board on December 22, 1922, adopted a resolution authorizing the construction of a "Colored High School." When such school, Crispus Attucks, was opened in September, 1927, all Negro high school students were forthwith compelled to attend it, regardless of their place of residence in the city. In 1935, Ch. 16 of the Acts of 1869 was further amended to require the Board to provide transportation for Negro students required to travel more than a certain distance by reason of its segregation policies.[48] Thus was instituted the policy of tax-paid transportation of school children (bussing).

Another Act of the 1935 General Assembly is instructive. A law enacted in 1907 had directed township trustees to abandon all schools under their charge at which the average daily attendance had been twelve or fewer pupils. The 1935 act[49] added the following proviso: "Provided, further, that nothing in this act, or in the act

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[47] Acts 1877, Ch. 81, § 1, p. 124, had amended Ch. 16 of the Acts of 1869 to require admission of Negro students to white schools, if no separate school of comparable grade was provided for Negroes.

[48] Acts 1935, Ch. 296, § 1, p. 1457.

[49] Acts 1935, Ch. 77, § 1, p. 231.

to which it is amendatory, shall authorize the discontinuance of any school exclusively for colored pupils where such school is the only school for colored pupils in such school corporation, and any such school heretofore discontinued by the operation of such act shall be re-established." (In sum, trustees were ordered by the State to furnish a separate school building and teacher for the instruction of, for example, one Negro child attending primary school, rather than permit that child to attend a white school).

In 1947, two bills were introduced in the General Assembly, each of which had as its purpose the elimination of segregation based on race, color, creed, etc., in the public school system. In due time, a public hearing was held on one of the bills by the House Committee on Education, at which time the then Superintendent of Schools of defendant Board, pursuant to its authorization, appeared and spoke in opposition. Neither bill passed. However, in 1949 an Act was passed which required desegregation, on a phased basis.[50] Thus ended, at least for a time (see Part VII), the official State policy of segregation.

* * * *

B. Low-Rent Housing Projects

Low-rent housing projects within the School City have significantly affected the racial composition of the schools. A project typical of this kind is constructed at the periphery of an established Negro residential area and, for that reason among others, attracts a Negro occupancy, which is eventually reflected in the racial composition of the school that serves the area in which the project is situated.

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[50] Acts 1949, Ch. 186, p. 603; Burns Ind.Stat.Ann. §§ 28-6106 to 28-6112 (1970), as amended I.C. 1971, 20-4-1-7 to 20-4-1-13.

Such an effect is to be seen in several elementary schools, including: School 67, in which Negroes constituted 4% of the student body in 1968-69 and 30.9% in 1970-71, owing to the opening of Eagle Creek Village at Tibbs Avenue and Cossell Road; School 112, in which Negroes constituted 13.7% of the student body in 1968-69 and 42.9% in 1970-71, owing to the opening of Raymond Villa, at Raymond Avenue and Perkins Street; School 71, in which Negroes constituted 10.8% of the student body in 1965-66 and 92.6% in 1970-71, owing to the opening of Hawthorne Place at 32nd Street and Emerson Avenue; and School 99, in which there were no Negro students in 1968-69 and in which Negroes constituted 33.9% of the student body at the end of the 1970-71 school year, owing to the opening of Beechwood Gardens at 30th Street and Graham Avenue.

Housing projects of the kind just described not only have racial consequences for the schools; each of them tends to represent, as well, a demand for a significant amount of school space. Eagle Creek Village, Raymond Villa, and Beechwood Gardens necessitated additions to Schools 67, 112, and 99, respectively, each of which cost about $1,300,000. Salem Village, at 30th Street and Baltimore Aevnue, necessitated the construction of a complete school (School 110), which has served a virtually all-black student body since it was opened in 1966.[81]

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[81] The plaintiff United States of America, which of course sponsors federally supported housing projects, has suggested a finding that the locations of six of the ten projects opened in the School City since 1965 have tended to promote integration in those instances. There is insufficient evidence to support such a finding.

UNITED STATES DISTRICT COURT
S. D. INDIANA
INDIANAPOLIS DIVISION

No. IP 68-C-225

UNITED STATES OF AMERICA,
Plaintiff,

DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, RUBY L. BUCKLEY, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,
Intervening Plaintiffs,

v.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, *et al.*,
Defendants,

OTIS R. BOWEN, as Governor of the State of Indiana, *et al.*,
Added Defendants,

CITIZENS FOR QUALITY SCHOOLS, INC.,
Intervening Defendant,

COALITION FOR INTEGRATED EDUCATION,
Amicus Curiae.

HAMILTON SOUTHEASTERN SCHOOLS, HAMILTON COUNTY, INDIANA, *et al.*,
Additional Added Defendants.

July 20, 1973

As Corrected Nov. 12, 1973
Supplemental Opinion Dec. 6, 1973

MEMORANDUM OF DECISION

DILLIN, District Judge.

I.

Introduction

This is a school desegregation action originally brought by the United States on May 31, 1968, pursuant to Section 407(a) and (b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6(a) and (b) against The Board of School Commissioners of Indianapolis, Indiana (hereinafter IPS), the members of the Board, and its appointed Superintendent of Schools.

On August 18, 1971, this Court found and concluded that IPS was guilty of unlawfully segregating the public schools within its boundaries. That decision was unanimously affirmed by the United States Court of Appeals for the Seventh Circuit and review was denied by the Supreme Court of the United States, without dissent. United States v. Board of Sch. Com'rs, Indianapolis, Ind., D.C., 332 F.Supp. 655, aff'd 7 Cir., 474 F.2d 81, cert. den., 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041 (1973). Such issue is res judicata.

In contemplating a remedy to vindicate the rights of Negro school children, this Court concluded that it could have ordered a massive "fruit basket" scrambling of students within IPS to achieve exact racial balancing. But the Court also concluded that in the long run, given the steadily rising percentage of Negro pupils within IPS, the racial composition of IPS would become nearly all Negro because of an acceleration in the departure of white families with children from IPS. In this connection the

Court discussed the "tipping-point" factor—the point at which white exodus from a school unit is accelerated by increase of Negro students beyond a certain variable percent, and noted that the tipping-point/resegregation problem would become insignificant if the boundaries of IPS were enlarged to include all of Marion County and a portion of its contiguous metropolitan region. The Court does not consider its conclusions in this area as res judicata.

In order to provide an appropriate adverse setting for further consideration of the legal and practical appropriateness of a metropolitan plan, the Court ordered the plaintiff United States to secure the joinder of necessary parties and seek further relief to determine the answers to certain questions posed by the Court.

On September 7, 1971, the United States (hereinafter the Government), pursuant to such order, moved to add as parties defendant all school corporations in Marion County, other than IPS. The motion was granted. However, the Goverrnment failed to assert any claims or seek any relief against such added defendants. A few days later the Buckley plaintiffs filed their petition to intervene in this action in their own right and as representatives of a class consisting of Negro school age children residing in Marion County, Indiana, who are required to attend segregated schools operated by IPS. The petitioners alleged that their interests and those of the class they represented were not being adequately protected by the original plaintiff, the United States, because the Government had failed to seek relief against the added school defendants. The Court granted the petition to intervene on September 14, 1971.

The Buckley intervening plaintiffs (hereinafter plaintiffs) eventually joined as added defendants Edgar D. Whitcomb (since succeeded by Otis R. Bowen), as Governor of the State of Indiana; Theodore Sendak, as At-

torney General of Indiana; John J. Loughlin (since succeeded by Harold H. Negley), as Superintendent of Public Instruction of the State of Indiana; The Indiana State Board of Education, and nineteen school corporations within and without Marion County, Indiana (including the ten in-county corporations joined by the Government), as follows:

Marion County

The Metropolitan School District of Decatur Township (hereinafter Decatur)

The Franklin Township Community School Corporation (hereinafter Franklin)

The Metropolitan School District of Lawrence Township (hereinafter Lawrence)

The Metropolitan School District of Perry Township (hereinafter Perry)

The Metropolitan School District of Pike Township (hereinafter Pike)

The Metropolitan School District of Warren Township (hereinafter Warren)

The Metropolitan School District of Washington Township (hereinafter Washington)

The Metropolitan School District of Wayne Township) (hereinafter Wayne)

School City of Beech Grove (hereinafter Beech Grove)

School Town of Speedway (hereinafter Speedway)

Boone County

Eagle-Union Community School Corporation (hereinafter Eagle)

Johnson County

Greenwood Community School Corporation (hereinafter Greenwood)

Hamilton County

Carmel-Clay Schools (hereinafter Carmel)

Hancock County

Greenfield Community School Corporation (hereinafter Greenfield)

Mt. Vernon Community School Corporation (hereinafter Mt. Vernon)

Hendricks County

Avon Community School Corporation (hereinafter Avon)

Brownsburg Community School Corporation (hereinafter Brownsburg)

Plainfield Community School Corporation (hereinafter Plainfield)

Morgan County

Mooresville Consolidated School Corporation (hereinafter Mooresville)

The geographical areas served by IPS and added defendants, with the exception of Greenfield, and Union Township of Eagle-Union, are reflected on Figure 1. Also represented thereon, for reasons which will hereafter appear, are territories or parts of territories served by certain other school corporations bordering on Marion County, namely, Clark-Pleasant Community School Corporation (Clark) and Center Grove Community School Corporation (Grove) of Johnson County; Delaware and Fall Creek Townships, a part of Hamilton Southeastern School Corporation of Hamilton County; Sugar Creek

Township, a part of Southern Hancock County Community Schools (Hancock) of Hancock County; and Moral Township, a part of Northwestern Consolidated School Corporation of Shelby County (Northwestern) of Shelby County.

The intervening defendant Citizens of Indianapolis for Quality Schools, Inc., is a not-for-profit corporation whose members are parents of children in IPS. Its initial attempt to intervene in this action, in opposition to the original complaint of the Government, was denied by this Court, although the Court permitted it to attend the original trial, present argument, and file a brief *amicus curiae*. The ruling was appealed and affirmed. United States v. Board of Sch. Com'rs, Indianapolis, Ind., 466 F.2d 573 (7 Cir. 1972). Subsequently, however, intervention was permitted and intervening defendant participated fully in the most recent trial.

Coalition for Integrated Education is an unincorporated association of individuals favoring a metropolitan plan of school desegregation, which filed a petition for leave to appear *amicus curiae* for the purpose of presenting a desegregation plan, and a supplemental motion for leave to file a brief. The names of the members of the association are attached to the original petition. The motion for leave to file a brief as *amicus curiae* is granted. The Court reserves ruling on the petition to file a plan, as premature.

II.

The Issues

The issues of fact submitted for trial are as follows:

1. Whether or not desegregation of IPS within its present boundaries (sometimes referred to as an "Indianapolis Only Plan") can be accomplished as required by the equal protection clause of the Fourteenth Amend-

ment in such a manner as to "work," within the meaning of Green v. County School Board, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968): "The burden on a school board today is to come forward with a plan that promises realistically to work . . ."

2. Whether or not any of the added defendant officials of the State of Indiana, their predecessors in office, or the added defendant The Indiana State Board of Education have acted to promote segregation, or failed to carry out duties imposed upon them by law in such a manner as to promote segregation or inhibit desegregation within IPS.

3. Whether or not any of the added defendant school corporations have acted to promote segregation either within IPS or within their own boundaries.

The issues of law presented are as follows:

1. Whether or not the acts of *de jure* segregation heretofore found to have been practiced by IPS can be imputed to the State of Indiana such that appropriate State officials or agencies may be directed to afford relief to vindicate the Fourteenth Amendment rights of plaintiffs and their class.

2. Whether or not appropriate State officials or agencies have the power to direct reorganization of IPS with other school corporations, or to direct the transfer or exchange of IPS pupils to or with other school corporations in order to vindicate such rights.

3. Whether or not this Court may act in the manner just described to vindicate such rights if responsible officials or agencies of the State fail to do so within a reasonable time.

III.

Viability of an Indianapolis Only Plan

As stated above, the Court in its original opinion expressed some doubts as to whether or not a stable desegregation plan could be established within the confines of IPS, based upon the evidence adduced at that trial, which was all to the effect that when the percentage of Negro pupils in a given school approaches 40%, more or less, the exodus of white pupils from such a school becomes accelerated and irreversible, resulting in resegregation. However, additional evidence on this issue was adduced at the recent trial, and the Court bases its findings exclusively upon such latter evidence.

Having considered such evidence, the Court finds it to be a fact that when the percentage of Negro pupils in a given school approaches 25% to 30%, more or less, in the area served by IPS, the white exodus from such a school district becomes accelerated and continues, as demonstrated by Figure 2. All witnesses agreed that once a school becomes identifiably black, it never reverses to white, in the absence of redistricting. Therefore, progressions from white to black are irreversible once the critical percentage has been reached in the absence of intervention through redistricting. Below the critical percentage, however, schools tend to remain stable, as demonstrated on Figure 3. With further reference to Figure 3, it will be noted that there is one elementary school within IPS which has remained stable over the past five years with a high degree of integration. This lone exception is School 86, which the Court judicially knows to be located in the Butler-Tarkington area of the city, mentioned in the testimony as an area in which the residents, black and white, have worked together for the past several years in a community relations program designed to maintain the stability of the neighborhood as

an integrated community. The results achieved show dramatically that such a program can be made to work, but unfortunately the other statistics illustrate all too well that the Butler-Tarkington situation is the exception and not the rule.

The Court has no reason to find or believe that a crash IPS-wide community relations program, even if one were in progress (and none is), would achieve a system-wide stabilization in time to preserve the entire system from becoming identified as racially black. The Court further finds that, given the present percentage of Negro pupils in the IPS system, which has risen to 41.1% since the previous trial, and the further fact that black enrollments in IPS will in the near future surpass white enrollments therein, as graphically illustrated on Figure 4, the right of plaintiffs and their class to attend schools which are not racially identifiable, as provided by the equal protection clause of the Fourteenth Amendment, cannot be accomplished within the present boundaries of IPS in a way that will work for any significant period of time.

In other words, it is apparent that as a sheer exercise in mathematics, it would be possible for this Court to order desegregation of IPS on a 58.9%-41.1% basis, or some basis similar thereto, so that no school could, for the time being, be racially identifiable as a black school. As a matter of fact, IPS announced rather dramatically during the recent trial that such a plan would be put into effect for the coming school year, but rejected such plan at its recent meeting of July 16, 1973, as the Court knows judicially. As demonstrated, however, such a plan, if put into effect, would have the effect of an immediate acceleration of white students into suburban white enclaves or private schools, so that IPS as a whole would predictably have a black majority within a matter

of two or three years. This is not the Court's idea of a plan which "promises realistically to work."

On the other hand, the alternative to such a plan is to limit desegregation to figures which are statistically tolerable insofar as "white flight" is concerned, such as to provide that schools which now contain few or no Negro students accept additional numbers of the minority race, not to exceed perhaps 20% to 30%. Such a plan would, of course, have the effect of affording education in a desegregated setting to those minority race students attending schools in which they would make up the minority of 20% to 30%; but considering the total percentage of minority race students in the IPS system, it is equally obvious that such a plan would leave a large number of schools with a minority percentage in excess of 50%, which would not only make them racially identifiable schools, but would once again accelerate white flight from those particular schools.

On this key question as to whether a meaningful desegregation plan could be put into effect within the confines of IPS, the Court heard expert opinions from numerous witnesses called by each side. As usual, they disagreed. However, in the Court's opinion, a clear preponderance of the expert opinion was that no feasible plan could be devised. Those who testified to the contrary tended to qualify their opinions, and in some instances the facts presented by such witnesses simply did not support their conclusions.

For example, Dr. Mercer, a witness called by the Government, testified as to numerous facts having to do with desegregation efforts in the State of California, and presented the City of Riverside as a city where desegregation was apparently working well. However, it developed that the Riverside plan was put into effect voluntarily, accompanied by much community relation effort sponsored by the school and the local news media, and finally that

the percentage of minority race students in the entire system was less than 25%. None of these facts have any relation to the situation in Indianapolis. On the other hand, the witness's own Figure 7, which is the last sheet of Government Exhibit 14, discloses the sharp and dramatic drop in "other-white" students in Inglewood, Pasadena, and San Francisco following public announcement that such schools would be required to desegregate, later followed by the filing of legal actions to accomplish such end. (The term "other-white" in California refers to those persons called "Anglos" in Denver and simply "whites" or "Caucasians" in Indianapolis. The California "other-white" is a white who does not have a Spanish surname.)

The testimony of another defense expert, Dr. Hooker, was completely demolished by cross-examination showing that in his published articles he had expressed views opposite to those given in this case, and Dr. Dodson testified that a metropolitan plan would be superior to one limited to IPS.

The solution, therefore, must be to look elsewhere, if this can be done within the law.

IV.

Responsibility of the State of Indiana

In its previous opinion of August 18, 1971, the Court devoted several pages of its opinion to tracing the history of segregation within Indiana beginning 1800, demonstrating that the State, through its legislative, executive, and judicial branches had practiced all manner of discrimination against Negroes, not only in the field of education, but in housing and innumerable sectors of their social and economic life, as well as in the area of civil rights. 332 F.Supp. pp. 658-665. None of such regrettable history, of which the Court then took judicial

notice, has been refuted by any added defendant, with the exception of a quibble about the effect of certain school laws passed in 1961 and thereafter. The Court therefore incorporates such previous history into this opinion by reference, save to the extent that its discussion of Acts of the General Assembly of 1961 and thereafter will be reviewed further hereafter.

Before entering into a discussion as to the specific acts or omissions of State officials having a bearing on the problems of segregation and desegregation, it seems appropriate at this point to set out in detail the role of the State in public education in Indiana, touched upon rather briefly in this Court's previous opinion.

The original seaboard colonies were, of course, founded in the 17th and 18th Centuries, when the concept of public education was unheard of. As a result, such schools which existed therein in the early days were either church supported or were supported strictly by private funds. The relics of that system linger today in various states which evolved from the original colonies so that, for example, the decision in Bradley v. School Board of City of Richmond, Virgnia, 462 F.2d 1058 (4 Cir. 1972), (*"Richmond"*), based its decision reversing an order of the District Court for a metropolitan desegregation plan in Richmond and surrounding counties primarily on the basis that the operation of public schools within the different counties of the Commonwealth of Virginia is a matter of local option, and that, if the option be exercised, the power to operate, maintain and supervise the public schools in a given county is in the exclusive jurisdiction of the local school board and not the state.

However, following the successful conclusion of the Revolutionary War, it was foreseen by the Congress that an educated citizenry was vital to maintaining an enlightened self-government as provided for in the Con-

stitution, and hence the education of all citizens became a concern of the Government. Thus it was that when the Northwest Territory was formed out of lands formerly claimed by the Commonwealth of Virginia, the Northwest Ordinance of 1787 provided:

> "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Art. III.

The State of Indiana along with the states of Michigan, Ohio, Illinois, Wisconsin, etc., were, of course, later formed out of the Northwest Territory, and such states accordingly provided by their respective constitutions for the establishment of systems of public education. The original 1816 Constitution of Indiana, Sections 1 and 2, Article 9, paraphrased the above quoted language from the Northwest Ordinance and provided that it should be the duty of the General Assembly to provide by law for a general system of education, ascending in a regular graduation from township schools to a state university wherein tuition would be free, and equally open to all. Article 8, Section 1, of the present Constitution, adopted in 1851, carries forward the duty of the State in the following language:

> "Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all."

Under the 1851 Indiana Constitution, the common schools as a whole are made a state institution. Ratcliff

v. Dick Johnson School Tp., 204 Ind. 525, 185 N.E. 143 (1933); Ehle v. State, 191 Ind. 502, 133 N.E. 748 (1922); City of Lafayette v. Jenners, 10 Ind. 74 (1857). The State owns and maintains the common schools just as it does its public institutions of every kind. State v. Haworth, 122 Ind. 462, 23 N.E. 946 (1890). School corporations within the system only hold title to such schools as trustees and the State has the right to change trustees by annexation at will. Board of School Com'rs v. Center Tp., 143 Ind. 391, 42 N.E. 808 (1896). The legislature may consolidate schools by resolution without notice to the voters or without any referendum or election. Fruit v. Metropolitan Sch. Dis. of Winchester, etc., 241 Ind. 621, 172 N.E.2d 864 (1961).

It was the intention of the framers of the Constitution to place the common schools under the direct control and supervision of the State. Green Castle Township v. Black, 5 Ind. 557 (1854); State v. Eddington, 208 Ind. 160, 195 N.E. 92 (1935). The authority over the schools and school affairs resides exclusively within the dominion of the legislature and the school system is a centralized and not a localized form of school government. Gruber v. State, 196 Ind. 436, 148 N.E. 481 (1925); Jordan v. City of Logansport, 178 Ind. 629, 99 N.E. 1060 (1912); State v. Ogan, 159 Ind. 119, 63 N.E. 227 (1902); State v. Haworth, *supra*; State v. Eddington, *supra*.

Under Article 8 of the Indiana Constitution, the power of the General Assembly to regulate the school system is practically unlimited. Kostanzer v. State, 205 Ind. 536, 187 N.E. 337 (1933). The employees of a school corporation undertake their duties not as officers of local units of self government but as officers of the public school system, which is a State institution. State v. Eddington, *supra*.

The General Assembly has the power to prescribe the terms of the employment contracts to be executed by

school corporations, Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 58 S.Ct. 443, 82 L.Ed. 685 (1937), and the power to provide a general system of licenses for those desiring to teach. Stone v. Fritts, 169 Ind. 361, 82 N.E. 792 (1907).

While the State in acting directly to carry out its educational functions under Article 8, Section 1, is not forbidden to create and use local corporations for that purpose, it assumes responsibility for the conduct of these corporations. Such corporations were and still are involuntary corporations established as part of the school system of Indiana and are but agents of the State for purposes of administering the State system of education. Indiana ex rel. Anderson v. Brand, *supra*; Campbell v. City of Indianapolis, 155 Ind. 186, 57 N.E. 920 (1900); Freel v. School City of Crawfordsville, 142 Ind. 27, 41 N.E. 312 (1895). Such corporations may only exercise the authority given them by the State, Ratcliff v. Dick Johnson School Tp., *supra*; Ehle v. State, *supra*, and the conduct and practices of these agent corporations must be considered acts of the State. Hummer v. School City of Hartford City, 124 Ind.App. 30, 112 N.E.2d 891 (1953), overruled in part on other grounds, Flowers v. Bd. of Com'rs of County of Vanderburgh, 240 Ind. 668, 168 N.E.2d 224 (1960).

Robinson v. Schenck, 102 Ind. 307, 1 N.E. 698 (1885), held that it was constitutional for the legislature to provide by general law for local school authorities to levy school taxes. Some of the general language in that case could suggest that local school corporations are to be treated as local units of self-government, as in Virginia. To clear up such an implication, the Supreme Court of Indiana in State v. Haworth, *supra*, made it clear that Robinson did not change the relationship of school corporations as agents of the State. The majority opinion specifically rejected the dissenting opinion's argument based on *Robinson* that the school corporations in the

State are units of self-government in which local control of the schools is left with the people within such corporation. The majority held instead that the authority and control of schools and school affairs is vested exclusively in the General Assembly and that such affairs are intrinsically matters of State concern and not of a local jurisdiction. "In such matters, the State is a unit, and the legislature the source of power." To the same effect, see Ft. Wayne Community Schools v. State, 240 Ind. 57, 159 N.E.2d 708 (1959).

To summarize in the words of the court in State v. Mutchler, 232 Ind. 580, 115 N.E.2d 206 (1953):

> "The people of Indiana have translated into a fundamental constitutional postulate the belief that the general diffusion of knowledge and learning throughout a community is essential to the preservation of free government, and in harmony with this constitutional postulate the Constitution recognizes that the business of education is a governmental function *and makes public education a function of state government as distinguished from local government....* It was evidently the intention of the framers of the Constitution to place the common schools under the direct control and supervision of the state, and make it a quasi-department of the state government, *a centralized and not a localized*, form of school government." (Emphasis added.)

The Indiana statutes on education are testimony to the constitutional and decisional history just discussed. The Indiana State Board of Education and its predecessor have been given great powers, and "It shall be the duty of the board to coordinate the work of the various commissions so as to bring about an effective and an (*sic*) unified school program and to make determinations in matters of jurisdiction between such commissions in ac-

cordance with the law, but all actions of the commissions within their respective jurisdictions shall be final." The "commissions" are on general education, textbook adoption, and teacher training and licensing. Indiana Code 1971, 20-1-1-1 & 20-1-1-2, Burns Ind.Ann.Stat. (hereinafter "Burns") § 28-101, 28-102.

Following said Section 20-1-1 of the Indiana Code of 1971, the first section having to do with schools, there follow some 349 solid pages of statutes enacted by the General Assembly regulating virtually every phase of school operation, printed single space, on unusually wide paper, in a type style reminiscent of that used in the exclusions section of an insurance policy. The annotated version of these laws occupies two complete volumes of Burns, comprising some 1,154 standard pages (but with annotations in small type), exclusive of indices and pocket parts. Burns, Vol. 6, parts 3 and 4. The administrative rules and regulations concerning education consume an additional 126 pages. Burns Ind.Adm. R. & Reg., Title 28. For obvious reasons, the Court will attempt no summary of this vast compendium, except to say generally that all phases of the operation of the public schools are regulated, in one way or another, by the State.

Of particular importance here, however, should be noted the statute, in effect from 1949 until 1972, which vested in the commission on general education of The Indiana State Board of Educaton the power and duty to regulate new school sites and buildings or any modifications of or additions to existing buildings, and established a division of schoolhouse planning under a director to be appointed by the state superintendent of public instruction with the approval of the governor. IC 1971, 20-1-2-1 to 20-1-2-6, Burns 28-301 to 28-306. Such law was repealed in 1972, but only because it was at such time replaced by a similar law. IC 1971, 20-1-1-6, as added 1972; Burns 28-109 (Pocket supp.).

Questions identical to those presented in this action have been considered by the Court of Appeals for the Sixth Circuit in Bradley et al. v. Milliken et al., 484 F. 2d 215 (1973). In upholding the trial court's determination that a metropolitan remedy would be appropriate to accomplish desegregation of the public schools of Detroit, it based its holding upon discriminatory practices on the part of both the Detroit school board and the State of Michigan found to be "significant, pervasive and causally related" to the segregation in the Detroit school system.

The discriminatory practices of the Detroit school board were, in general, acts of commission identical to those found to have occurred in Indianapolis, such as gerrymandering school attendance zones, making boundary changes which promoted segregation, providing optional attendance zones in "changing" areas, assigning teachers and staff so as to mirror the racial complexion of a school's student body, assigning students to elementary and high schools according to the racial patterns of the feeder schools, selecting sites for new schools and building additions to existing schools in such a fashion as to separate the races, etc.

As between the four discriminatory practices charged to the State, the Sixth Circuit held:

> "The clearest example of direct State participation in encouraging the segregated condition of Detroit public schools, however, is that of school construction in Detroit and the surrounding suburban areas. Until 1962 the State Board of Education had direct statutory control over site planning for new school construction. During that time, as was pointed out above, the State approved school construction which fostered segregation throughout the Detroit Metropolitan area . . . . Since 1962 the State Board has

continued to be involved in approval of school construction plans."

In the case at hand the evidence shows that Arlington High School was opened in 1961 with a Negro enrollment of 0.23%, Northwest High School was opened in 1963 with a Negro enrollment of 0.0%, and John Marshall High School was opened in 1967 with a Negro enrollment of 0.3%. Inspection of maps in evidence discloses that Arlington is less than a mile from the extreme northeast corner of IPS, Marshall is squarely on the extreme east line of IPS, and Nortwest slightly less than a mile from the extreme west line of IPS. This Court found in its previous opinion, and finds once again, that the placement of such schools constituted acts of *de jure* segregation on the part of IPS. The former holding has already been affirmed by the Seventh Circuit, 474 F.2d at pp. 87, 88. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

Here, as in Michigan, the sites for the three high schools mentioned were necessarily approved by the appropriate agencies of defendants The Indiana State Board of Education and the Superintendent of Public Instruction. On the authority of *Bradley*, these were acts of *de jure* segregation on the part of officials of the State. Similar examples could be pointed out with regard to site selection for construction and enlargement of elementary schools, but the foregoing examples are so obvious that there is no need to labor the point.

Further, at all times since 1949, the Indiana statute forbidding racial segregation in educational opportunity has been in effect, IC 1971, 20-8-6-1 et seq., Burns 28-6106 et seq., and the mandate of the Supreme Court of the United States in Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954),

has been the law since 1954. According to the evidence in this case, the officials of the State charged with oversight of the common schools have done almost literally nothing, and certainly next to nothing, to furnish leadership, guidance, and direction in this critical area. Even at this late date, the division of equal educational opportunity of the Indiana Department of Public Instruction, headed by the State Superintendent, consists of but four staff members and a secretary, to cover the entire State of Indiana, and has only been in existence for the past two years pursuant to a Federal grant. The Court finds that the failure of the State Superintendent and the Board of Education to act affirmatively in support of the law was an omission tending to inhibit desegregation.

V.

Acts of Added Defendant School Corporations

There was no evidence that any of the added defendant school corporations have committed acts of *de jure* segregation directed against Negro students living within their respective borders. In fact, the evidence shows that, with a few exceptions, none of the added defendants have had the opportunity to commit such overt acts because the Negro population residing within the borders of such defendants ranges from slight to none, as illustrated on Figure 5. However, with respect to the added defendants situate within Marion County, the evidence is that when the Marion County School Reorganization Committee, appointed pursuant to the Indiana School Reorganization Act of 1959, IC 1971, 20-4-1-2, Burns 28-3501 et seq., made its initial and unanimous recommendation that all of the school systems in Marion County be merged into one metropolitan system, the added Marion County defendants were unanimous in their opposition to the plan (which was, however, favored by IPS). Subsequently,

and for the stated reason that in its opinion the metropolitan plan could not be adopted in view of the suburban opposition, the Reorganization Committee completely reversed itself and proposed a plan which, with minor exceptions having to do with areas within Center Township, froze all existing school corporations in Marion County according to their then existing 1961 boundaries.

Thus school reorganization in Marion County, rather than reorganizing anything except the name and method of school government as to certain added defendants, did nothing at all. By way of contrast, the evidence is that on a state-wide basis reorganizations pursuant to the Act of 1959 ultimately resulted in reducing the number of school corporations by approximately 50%, and created school corporations merging what had formerly been separate corporations in cities, towns, and their adjoining unincorporated areas, as well as merging what had formerly been separate township systems into consolidated systems. Some of the latter mergers extended across county lines, as reflected by defendant Wayne's Exhibit D. As to IPS, this farcical "reorganization" had the effect of making it technically a reorganized school corporation, and thus hampered its ability to be further reorganized without complying with all of the cumbersome procedures of the 1959 Act and other crippling legislation.

That the added defendants had a legal right to resist the recommendation of the School Reorganization Committee under existing law cannot be denied. At the same time, it is apparent that confining IPS to its existing territory had the effect, which continues, of making it first difficult and now impossible to comply with the law requiring meaningful desegregation.

At this point the Court deems it appropriate to consider briefly the question as to why Figure 5 reflects such

a remarkable absence of Negro citizens from the territories of the added defendants with the exception of Washington and Pike (those Negro citizens residing in Wayne are concentrated in that part of Wayne which is within IPS, according to school enrollment figures). Such absence is particularly glaring under the evidence, which reflects virtually no Negroes in Speedway, which has within its borders Detroit Diesel Allison Division of General Motors Corporation, the largest single employer of labor in Marion County; virtually none in Beech Grove, which houses the shops of the Penn Central Transportation Company; virtually none in Warren outside IPS, although Western Electric, situate in Warren Township, employs thousands of persons who busily make all the telephones for American Telephone and Telegraph. Equally remarkable is the absence of Negroes from Lawrence, which has the vast Army Finance Center located some two miles east of its high school. Either it must be concluded that Negroes, unlike other citizens, simply do not like to live near their places of employment (and all of the employers mentioned are equal opportunity employers), or there must be some other reason.

In *Richmond* the court said, among other things, "We think that the root causes of the concentration of blacks in the inner cities of America are simply not known . . . ." This Court finds that statement incredible. Although it is undoubtedly true that many factors enter into demographic patterns, there can be little doubt that the principal factor which has caused members of the Negro race to be confined to living in certain limited areas (commonly called ghettos) in the urban centers in the north, including Indianapolis, has been racial discrimination in housing which has prevented them from living any place else.

In the trial just concluded a witness called by the added defendants conceded that Negroes have been se-

verely limited in their search for housing in the Indianapolis area to properties advertised in local newspapers as "for colored," and experts called by the Government testified that discrimination has been a root cause of the black central city phenomenon.

The Court sees no point in laboring the obvious. If racial discrimination did not exist in the United States, Indiana, and the Indianapolis metropolitan area, it would not be necessary to have laws against it. Yet the past ten years have brought forth a spate of such laws, local and national, preceded by reports of investigating commissions without end, all pointing up what every citizen knows—that discrimination is yet with us in a nation which daily pledges that it is ". . . one nation, under God, *indivisible*, with liberty and justice for *all*."

Such racial discrimination, which has been tolerated by the State at the least, and in some instances has been actively encouraged by the State, as set out in this Court's previous opinion, has had, as its end result, the creation of an artificial unrepresentative community, as pictured by the exhibits in this case. At the very least it may be said that Negroes have consistently been deprived of the privilege of living within the territory of the added defendants by reason of the customs and usages of the communities embraced within such boundaries, and of the State.

The foregoing should not be taken to mean that this action is one having to do with discrimination in housing, and this Court does not consider that a school desegregation action is one in which it is appropriate to attempt to remedy such discrimination, past or present. However, when it may be demonstrated that, as here, the discriminatory customs and usages mentioned have had a demonstrably causal relationship to segregation in the schools, such factor should not be casually swept under the table as in *Richmond*.

VI.

Conclusions of Law

The Court concludes, as a matter of law, as follows:

1. The acts of *de jure* segregation heretofore found to have been practiced by IPS can be, and are imputed to the State of Indiana.

2. The Superintendent of Public Instruction, The Indiana State Board of Education, and other responsible agents and agencies of the State of Indiana, and the State itself, have each practiced *de jure* segregation, both by commission and omission.

3. The General Assembly of the State of Indiana has the power, and it is its duty, to devise a metropolitan plan of common school education in the Indianapolis metropolitan area, which may be to direct the reorganization of IPS with other school corporations, in whole or in part, or to direct the transfer or exchange of IPS pupils to or with other school corporations, in such a manner as to vindicate the Fourteenth Amendment rights of plaintiffs and all Negro children presently within the jurisdiction of IPS to attend desegregated, non-racially identifiable schools.

4. If the General Assembly fails to act in the manner described within a reasonable time, this Court has the power and the duty to devise its own plan, and to order the defendant and the added defendant school corporations, State Superintendent of Public Instruction, and The Indiana State Board of Education to implement the same.

In short, paraphrasing the holding of the Sixth Circuit in Bradley et al. v. Milliken et al., *supra*, this Court holds that the record establishes that the State has committed *de jure* acts of segregation and that the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts. There can be little

doubt that a federal court has both the power and the duty to effect a feasible desegregation plan. Indeed, such is the essence of *Brown II*. Brown v. Board of Education, 349 U.S. 294, 300-301, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). In the instant case the only feasible desegregation plan involves the crossing of the boundary lines between IPS and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan. The power to disregard such artificial barriers is all the more clear where, as here, the State has been guilty of discrimination which had the effect of creating and maintaining racial segregation along school district lines. United States v. Scotland Neck Board of Education, 407 U.S. 484, 489, 92 S.Ct. 2214, 33 L.Ed.2d 75 (1972); Wright v. City of Emporia, 407 U.S. 451, 463, 92 S.Ct. 2196, 33 L.Ed.2d 51 (1972); United States v. State of Texas, 447 F.2d 441, 443-444 (5 Cir. 1971); Haney v. County Board of Education of Sevier County, 429 F.2d 364, 368 (8 Cir. 1970). See also Davis v. Board of School Commissioners, 402 U.S. 33, 36-38, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971).

There exists, however, an even more compelling basis for this Court's crossing artificial boundary lines to cure the State's constitutional violations. The instant case calls up haunting memories of the now long overruled and discredited "separate but equal doctrine" of Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). If we hold that school district boundaries are absolute barriers to an IPS school desegregation plan, we would be opening a way to nulify Brown v. Board of Education which overruled *Plessy, supra.*

VII.

The Area of a Viable Metropolitan Plan

In considering a metropolitan plan, it is apparent that, to name a few factors, the area should be reasonably

compact in size in relation to its center, should not be separated by massive natural obstacles, and otherwise should be adaptable to the reasonably speedy transportation of school children. Also, it would seem only reasonable to examine whether or not the area to be considered has significant common interests with the area hub. The Court now examines the situation with regard to the area depicted on Figure 1.

In the first place, the Court knows judicially that the entire area consists of virtually flat land, gently sloping from the northeast to the southwest with a fall of approximately 150 to 200 feet in approximately 35 miles. The area contains no natural barriers of any consequence; two fairly sizeable reservoirs, Geist and Eagle Creek, are located northeast and northwest, respectively, and pose no obstacle to movement of people to or from the center of the area, while White River is little larger than a robust creek, and is crossed by numerous bridges. With a very few exceptions, such as added defendants in their roles as employers, all industrial plants and other major places of employment within the area are concentrated either within the boundaries of IPS or are within a few city blocks of such boundaries in Wayne and Warren Townships and the towns of Speedway and Beech Grove. Indeed, as the evidence discloses, many of the added defendant school corporations are the largest single employers of labor within their respective borders!

The employment situation is represented on Figure 6, which shows graphically that, with the exception of the City of Greenfield (not shown on Figure 1), more than half (in most cases more than 60%) of the residents of each unit shown on Figure 1 are employed in Marion County—as a practical matter in IPS, or within a few city blocks thereof. If the rather substantial number of workers who did not list their place of employment are distributed in proportion to those who did, it is apparent that the true percentage of Marion County workers in the area is even higher than as indicated.

The employment picture just described results in huge flows of traffic from the "bedroom" townships primarily to Center, Warren and Wayne Townships of Marion County each weekday morning, and back again each evening. In order to accommodate this flow of traffic, the Indianapolis area, with a huge assist from the Federal government, is blessed with an extraordinarily efficient highway network. The central area is completely looped by Interstate Highway I-465, a six-lane, divided, limited access highway, typical of such highways in the Interstate System. The loop varies in its distance from Monument Circle, the hub of downtown Indianapolis, from as little as 4.50 miles, due south, to as much as 11.50 miles to the nothwest, averaging perhaps six or seven miles in distance from such central reference point. Additionally there are no less than seven additional legs of Interstate highways branching off of I-465, and in some instances, coming inside the I-465 loop. Specifically, I-74 runs northwest and southeast from I-465, I-69 runs northeast from I-465, I-70 runs southwest and due east from I-465 (with construction in progress to link up both legs through the center of this city), and I-65 runs northwest and southeast from I-465 (I-65 will also link both of its legs through the center of the city, and the north leg is already open from I-465 to 11th and Meridian Streets, in downtown Indianapolis).

In addition, there are many other multilane highways leading into, out of, and through the central area, many of which are divided, such as S. R. 67 to the southwest and northeast, U.S. 40 due east and west, S. R. 431 and U.S. 31, each running due north and south to southeast, S. R. 37 south and northeast, and S. R. 100, running along the north and east sides, just inside I-465. Such routes, and other main highways, are illustrated on Figure 7.

Virtually all points of interest for cultural, sports, and higher educational activities are located within IPS. For

example, as the Court knows judicially, Butler University, Marian College, Indiana Central College, the Indianapolis campus of Indiana and Purdue Universities are so located, as are the Indianapolis Zoo, the Children's Museum, the Indiana State Fairgrounds, the Indiana Capitol and office buildings, all major federal offices, Clowes Hall (an outstanding theater for the performing arts), the Indianapolis Sports Arena, the Indianapolis Convention Center, etc. The Indianapolis Art Museum directly adjoins an IPS boundary, as does the Indianapolis Motor Speedway (located in Speedway).

Just as the working parents of the suburbs drive back and forth to work each day, so are most suburban children bused to and from school. As shown on Figure 8, out of 114,696 students in suburban schools, 90,266 or 78.7% are bused. The State reimburses each school corporation a portion of the cost of busing each child. (Also, it should be noted, the State reimburses each added defendant, except Speedway, a substantial portion of its costs or operation, according to a complicated formula.) These bus routes are extremely time consuming, as anyone knows who has the misfortune to follow a bus down the highway, since the custom in the suburban areas is to pick up the children on virtually an individual basis. However, assuming that children walk to a central school or other convenient point, such as most IPS pupils do, and are then transported non-stop to their designated school of attendance via the major traffic arteries (during which period of transportation they would be going opposite to the flow of commuter traffic, and hence not impeded by it) the Court is of the opinion that—given logical and most convenient assignments—virtually all students could be delivered in thirty minutes. Thirty or even forty-five minutes is not an unreasonable time, and altogether comparable to that required for such transportation elsewhere in Indiana.

As shown in Figure 4, previously referred to, the white pupil enrollment within IPS is sharply falling, while that of Negro pupils is rising. On the other hand, the population of each area in which added defendants operate their schools, and the areas of non-defendant school districts adjoining Marion County are rapidly rising in population, virtually all white. These changes are illustrated in Figures 9, 10, and 11.

It was argued by added defendants that the Negro birth rate and in-migration had declined to the point where further increase in the black school population would not occur. This not only begs the question of white migration to the suburbs, but cannot be demonstrated statistically, as shown by Figure 12, reflecting that estimated black enrollments in grade 1 in 1973 virtually equal black births in Indianapolis in 1967—an obvious statistical improbability without continued in-migration.

With regard to the defendant Greenfield, Union Township of Eagle-Union and certain omitted townships of the non-defendants Hamilton Southeastern, Southern Hancock, and Northwestern, the Court is of the opinion that the distances involved are impractical, and therefore makes no recommendation that they be included in a metropolitan plan. The Court does recommend that all other added defendants be included in the metropolitan plan, as well as Eagle-Union to the extent of Eagle Township.

The Court observes that, on the basis of the applicable figures, the General Assembly may also wish to add the non-defendants Center Grove, Clark-Pleasant, Southern Hancock, Hamilton Southeastern to the extent of Delaware and Fall Creek Townships, and Northwestern to the extent of Moral Township to the plan. Its ability to do so is undoubted. State v. Mutschler, *supra*. However, the Court can make no finding or recommendation with respect to these corporations until such time as they have

had their day in court. Intervening plaintiffs are directed to interplead such corporations as additional added defendants forthwith.

VIII.

Constitutionality of Certain Indiana Statutes

Questions posed by the Court in its previous opinion inquired as to the constitutionality of certain Indiana statutes, specifically Chapter 186 of the Acts of 1961, IC 1971, 20-3-14-1, 20-3-14-10, Burns 28-2338, 28-2346, 28-2347 (1968 Cum.Supp.); Chapter 52 of the Acts of 1969, IC 1971, 20-3-14-9, Burns 28-2346a (1970 Cum.Supp.), and Chapter 173 of the Acts of 1969, IC 1971, 18-4-1-1 to 18-4-5-4, Burns 48-9101 et seq.

In the opinion of the Court such statutes, along with the application or the misapplication of the School Reorganization Act of 1959, certainly placed IPS in a strait jacket. However, in view of the Court's other findings and conclusions, it is unnecessary to consider the question of unconstitutionality.

IX.

Interim Relief

The Court is of the opinion that it would be without jurisdiction to order the exchange of pupils between IPS and added defendants at this time. It is Negro children of IPS and not suburban children who are being deprived of a constitutional right, and so long as the various school corporations remain separate the Court believes that it would have no basis to direct that a suburban child be transported out of its own school corporation. However, the Court knows of no reason why added defendants should not immediately accept a reasonable number of Negro children from IPS on a transfer basis, effective as of the beginning of the 1973-74 school year, and it is so ordered. In this connection, the evidence shows that

virtually all added defendants routinely exchange or transfer pupils for various educational purposes. The Court can think of no more important form of special education for a Negro child than going to school in an integrated environment.

As shown by the evidence, Negro pupils constituted 39.5% of the 1972-73 enrollment of IPS, but constituted but 24.3% of the total enrollment in Marion County and 19.5% of the total enrollment in the Figure 1 area for the same period. Although a perfect racial balance in each school is not required by law and will not be ordered, the General Assembly will presumably give careful consideration to these relative percentages. Also, the General Assembly should keep in mind that "tokenism" will not, in the Court's opinion, meet constitutional requirements.

With respect to IPS itself, it is not true that children of both races may not be transported or otherwise exchanged. As repeatedly pointed out by this and all other Federal courts in the land, following, as we must, the pronouncements of the Supreme Court of the United States, there is nothing sacred about the attendance zones within a school corporation, no constitutional right in a student to atend a particular school (except that a child of a minority race has a right to attend a desegregated school), and so IPS must immediately take steps to reduce the amount of segregation in its system. However, final relief cannot be had until the General Assembly acts, or this Court is compelled to devise its own plan because of default on the part of the General Assembly.

The Court has given consideration to the average daily attendance in the various schools of added defendants, as shown by the evidence, and is pleased to note that such averages are all well below that permited by State authorities. If each school accepted transfer of 5% of its present enrollment, this would amount to an average of little

more than one child per classroom, which is certainly a reasonable figure and one well below what the Court believes a proper metropolitan plan would accomplish. However, exceptions should be noted in two instances—that of Pike and Washington.

Washington already has a Negro percentage of 11.29% and Pike a percentage of 8.17%. Washington has an exemplary record of fair treatment of its minority students, and has also aggressively added minority race members to its faculty and staff. Primarily, however, because of their present minority enrollments, transfers to these added defendants should be limited.

It is therefore considered and ordered that, as interim measures, the following be accomplished prior to the beginning of the 1973-74 school year:

1. IPS is directed to transfer to each of the added defendants, except Washington and Pike, a number of Negro students equal to 5% of the total 1972-73 enrollment of each transferee school, respectively, to transfer to Washington 1% of its 1972-73 white enrollment, and to Pike 2% of its white enrollment for the same school year. Provided, however, that the number of students who attended school in Union Township of Boone County for such school year shall be deducted from the Eagle-Union total before applying said percentage.

2. IPS shall not be required to transfer kindergarten students, nor students commencing their twelfth year. The numbers of students in such grades enrolled in added defendants' schools for the year 1972-73 shall, however, be counted in arriving at the total to which the applicable percentage figure shall be applied.

3. Each of the added defendants is directed to accept such transferee students and enroll them accordingly.

4. The cost of transportation and tuition of such students shall be the obligation of IPS; provided, that IPS shall be entitled to a credit for any excess State reimbursement paid to a transferee corporation if any, as a result of the presence of transferred pupils.

5. If any teachers presently employed by IPS are rendered surplus as a result of this order, and additional teachers are needed by any added defendant as a result hereof, first consideration shall be given by such added defendant to employing a qualified IPS teacher.

6. The added defendants and IPS, through their respective boards, superintendents, or other designated agents are ordered to meet together forthwith, and to continue to meet until the various logistical problems made necessary by this order are resolved. Unresolved issues, if any, may be referred to the Court for ruling.

7. IPS is directed to rearrange the enrollment patterns in its elementary schools, effective at the beginning of the 1973-74 school year, such that each school will have a minimum Negro enrollment of in the area of 15%. The pairing or clustering of schools, and realignment of school assignment zones will be employed. Pairing or clustering should be of schools in close proximity, if possible. Such action will result merely in an expansion of the neighborhood or community school concept, and reduce the necessity of busing. If after utilizing such procedures, certain schools do not meet the required numbers, pairing or clustering of schools in non-contiguous zones will be resorted to. *Swann*, 402 U.S. at 28, 91 S.Ct. 1267.

8. If transportation of pupils is required to accomplish the result just ordered, IPS and defendant officials of IPS are instructed that transportation of students of the two races shall be generally proportionate. However, nothing herein should be construed as preventing IPS

from closing obsolete, heavily black schools if no longer needed for student housing, and in such event it will necessarily follow, in some cases, that a disproportionate number of black students will require transportation.

9. IPS is further directed to rearrange the feeder patterns of its high schools, so as to secure enrollment of Negro students in each school more nearly approaching their numbers in the system. Specifically, the number of such students in Thomas C. Howe High School should be increased to the area of 25%, and that at Shortridge reduced to not more than the area of 60%. In making transfers of high school pupils to added defendants, the Board should also keep in mind that Negro percentages at Arlington and Broad Ripple are already somewhat past the 40% level, and should be reduced, if possible.

10. All defendants who have not done so are directed to institute appropriate in-service training courses for their respective faculties and staff, and otherwise to orient their thinking and those of their pupils toward alleviating the problems of segregation.

In this last connection, the Court was pleased to learn from the evidence of the recognition given to Negro students by their fellow white students in the few suburban schools which they attended, and of the honors, both scholastic and otherwise, which such Negro students have earned in such schools. These facts, put in evidence by added defendants, indicate to the Court that children are basically inclined towards judging each other on the merits and that, if permitted to follow their own decent instincts, will accept each other on the basis of equality, without racial hatred. There just may be a message in this evidence for the adult world.

11. John O. Moss and John Preston Ward, attorneys for intervening plaintiffs and their class, are entitled to

recover their reasonable attorneys fees and expenses, and intervening plaintiffs are entitled to recover their costs. Such attorneys are directed to submit their respective petitions for fees and allowances. Apportionment of the cost of same is reserved.

12. The Court retains continuing jurisdiction herein.

All of the above is considered ordered, and adjudged this 20th day of July, 1973.

SUPPLEMENTAL MEMORANDUM OF DECISION

I. *Introduction*

Heretofore, on August 18, 1971, the Court filed herein its Memorandum of Decision, incorporating its findings of fact and conclusions of law, and making certain interim orders, with respect to the issues presented by the complaint of the original plaintiff, United States of America, and the answer of the original defendants, The Board of School Commissioners of the City of Indianapolis, the individual members of such Board, and the Board's appointed Superintendent of schools. Such decision, which will be referred to hereafter as "*Indianapolis I*," is reported in D.C., 332 F.Supp. 655, aff'd, 474 F.2d 81 (7 Cir. 1973), cert den., 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041 (1973).

Thereafter, on July 20, 1973, the Court filed herein a second Memorandum of Decision, incorporating its findings of fact and conclusions of law, and making certain interim orders, with respect to certain issues presented by the complaint of the original and added plaintiffs, Donny Brurell Buckley, et al. and the answers of the original and added defendants. Such decision will be referred to hereafter as "*Indianapolis II*," is reported ante, p. 1191, 37 Ind.Dec. 524, and is now on appeal to the Court of Appeals for the Seventh Circuit, Nos. 73-1968 to 73-1984, incl.

The key decision made in *Indianapolis I* was that the Indianapolis public school system (hereafter "IPS") was being operated by the original defendants, and had been operated by their predecessors in office, as a system practicing *de jure* segregation of students of the Negro race. It was therefore held that the Negro students were being denied the equal protection of the laws, as guaranteed by the Fourteenth Amendment. Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Certain interim measures tending to prevent further segregation were ordered, pending consideration of the questions to be presented and later decided in *Indianapolis II*, it being understood that the law required the defendants to take affirmative action to desegregate IPS. Green v. County School Board, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

The key decisions made in *Indianapolis II* were that (1) as a practical matter, desegregation promising a reasonable degree of permanence could not be accomplished within the present boundaries of IPS, and (2) added defendant officials of the State of Indiana, their predecessors in office, the added defendant The Indiana State Board of Education, and the State itself have, by various acts and omissions, promoted segregation and inhibited desegregation within IPS, so that the State, as the agency ultimately charged under Indiana law with the operation of the public schools, has an affirmative duty to desegregate IPS.

The court also held in *Indianapolis II* that IPS could be effectively desegregated either by combining its territory with that of all or part of the territory served by certain added defendant school corporations, into a metropolitan system or systems, and then reassigning pupils within the expanded system or systems thus created, or by transferring Negro students from IPS to added defendant school corporations, either on a one-way or an

exchange basis. It further held that the State, through its General Assembly, should be first afforded the opportunity to select its own plan, but that if it failed to do so within a reasonable time, the Court would have the power and the duty to promulgate its own plan, and place it in effect. Bradley et al. v. Milliken et al, 484 F.2d 215 (6 Cir. 1973). See Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

By way of affirmative relief pending action by the General Assembly, the Court ordered IPS to effect pupil reassignments for the 1973-74 school year sufficient to bring the number of Negro pupils in each of its elementary schools to approximately 15%, which has been accomplished. The Court also directed IPS to transfer to certain added defendant school corporations, and for such corporations to receive and enroll, a number of Negro students equal to 5% of the 1972-73 enrollment of each transferee school, with certain exceptions. This order was, on August 8, 1973, stayed by the Court until the 1973-74 school year by an order made in open court but not previously reduced to writing.

At this time, certain matters have been presented to the Court, both formally and informally, which require further rulings in the premises. Such rulings are now made, as hereafter set out, as supplementary to or, in some instances, in lieu of rulings heretofore entered in *Indianapolis II*, as heretofore modified.

II. *The Question of a "Reasonable Time" for State Action*

As stated, it was the Court's conclusion that the State should be afforded the opportunity, for a reasonable period of time, to discharge its affirmative duty to desegregate IPS. The question has arisen as to how long a time is reasonable.

As the Court knew judicially at the time it entered its decision in *Indianapolis II*, the General Assembly was scheduled to organize in November, 1973, for a session to begin in early January, 1974. It has so organized, and numerous bills have already been introduced—none, to the Court's knowledge, having to do with the subject at hand. As the Court also knows judicially, various legislative leaders have publicly announced that the coming session is expected to be short, and targeted for conclusion within a matter of a month or so.

Under the circumstances, considering the urgency of the problem presented, the fact that members of the General Assembly have had since July 20, 1973 to consider the problem, and the anticipated length of the coming legislative session, the Court considers a reasonable time within which the General Assembly should act to be the end of its January, 1974 session or February 15, 1974, whichever date is sooner. The Court also considers that any legislation adopted by the General Assembly on the subject of the desegregation of IPS should be effective for the 1974-75 school year.

III. *The Duty of the General Assembly*

In its opinion in *Indianapolis II*, the Court pointed out in section IV thereof that the ultimate responsibility for the operation of all public schools in Indiana lies in the General Assembly, and that it has the undoubted power to desegregate IPS by appropriate legislation, citing the Indiana Constitution and some twenty cases decided by the Indiana Supreme and Appellate Courts. It also held that it was the General Assembly's duty to do so, based upon its findings from the evidence that it is not possible for the IPS School Commissioners to bring about a lasting desegregation within IPS boundaries.

In reviewing that opinion, it now occurs to the Court that it perhaps placed undue stress on the General Assembly's power, and not enough on its duty; this failure of direction on the part of the Court may account for the General Assembly's seeming lack of attention to the problem to date, as the Court has no reason to doubt that the able members of that body will do their sworn duty to support the Constitution, once that duty is more clearly defined. By "sworn duty," the Court of course refers to the oath taken by each member of the General Assembly pursuant to Article 6, Clause 3 of the Constitution of the United States, which reads, in applicable part, as follows:

> ". . . (T)he Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; . . ."

As to what that duty entails, in this instance, may be best ascertained by the guidelines laid down by the Supreme Court of the United States, whose decisions and interpretations of the Constitution are final and binding on all citizens, including elected and appointed public officials, unless thereafter changed by that Court or by Constitutional amendment. Marbury v. Madison (U.S.) 1 Cranch 137, 2 L.Ed. 60 (1803). It is such guidelines which this Court has endeavored to follow to date in this rather difficult case—not because of any personal views of the Court, but for the simple reason that they constitute the law of the land, in every State and Territory, and the Court, pursuant to its own oath, may do no less. These guidelines, expressed in direct quotation from significant opinions of the Supreme Court, are as follows:

> "Does segregation of children in public schools solely on the basis of race, even though the physical fa-

cilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. . . .

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place . . . Plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. . . ." Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (Brown I)

". . . (T)he courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. . . ." Brown v. Board of Education of Topeka, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (Brown II)

". . . (T)he members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State. . .

* * * * * *

"Article 6 of the Constitution makes the Constitution the 'supreme Law of the Land.' . . . (T)he federal judiciary is supreme in the exposition of the law of the Constitution. . . . It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown Case is the supreme law of the land, and Art 6 of the Consti-

tution makes it of binding effect on the States " 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. 6, cl. 3, 'to support this Constitution.' . . . No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. . . ." Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5, 19 (1958)

"Delays in desegregating school systems are no longer tolerable." Bradley v. School Board of Richmond, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 (1965)

"The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.

* * * * * *

"The obligation of the district courts . . . is to assess the effectiveness of a proposed plan in achieving desegregation. . . . The matter must be assessed in light of the circumstances present and the options available in each instance.

* * * * * *

" ' "Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. . . . (I)f it fails to undo segregation, other means must be used to achieve this end.' " Green v. County School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968)

"We do not hold that 'free transfer' can have no place in a desegregation plan. But like 'freedom of choice,' if it cannot be shown that such a plan will further rather than delay conversion to a unitary,

non-racial, nondiscriminatory school system, it must be held unacceptable." Monroe v. Board of Commissioners, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968)

"Nearly 17 years ago this Court held, in explicit terms, that State-imposed segregation by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings. . . .

* * * * * *

"The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. . . .

"If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

* * * * * *

"The school authorities argue that the equity powers of federal district courts have been limited by Title IV of the Civil Rights Act of 1964, 42 USC § 2000c. The language and the history of Title IV shows that it was enacted not to limit but to define the role of the Federal Government in the implementation of the Brown I decision. . . .

* * * * * *

". . . The proviso in § 2000c-6 is in terms designed to foreclose any interpretation of the Act as expanding the *existing* powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those powers or with-

draw from courts their historic equitable remedial powers. . . .

* * * * * *

". . . Bus transportation has been an integral part of the public education system for years. . . . Eighteen million of the Nation's public school children . . . were transported to their schools by bus in 1969-70 in all parts of the country.

". . . The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.

"Thus the remedial techniques used in the District Court's order [pairing, busing, etc.] were [well] within that court's power to provide equitable relief. . . ." Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971)

"As we have held, 'neighborhood school zoning' . . . is not the only constitutionally permissible remedy; nor is it per se adequate to meet the remedial responsibilities of local boards. Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. A district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiguous and noncontiguous attendance zones. . . . The measure of any desegregation plan is its effectiveness.

"On the record before us, it is clear that . . . inadequate consideration was given to the use of bus transportation and split zoning. . . ." Davis v. Board

of School Commrs., 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971)

"Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate dual school systems.

"Similarly, the flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. . . . (T)he Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy. . . .

"We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, 'or for the purpose of creating a balance or ratio,' will similarly hamper the ability of local authorities to effectively remedy constitutional violations. . . .(B)us transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it." North Carolina Bd. of Ed. v. Swann, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971)

IV. *Guidelines of this Court—General*

It is, of course, recognized by the Court that it cannot issue a positive order to the General Assembly to enact specific legislation. It is for such reason that the

Court has suggested several different methods by which the General Assembly could approach the problem of effectively desegregating IPS, and it does not imply that there may not be other equally effective methods which may occur to that body.

Within the context of what has been suggested as possible alternatives, however, the Court offers further observations, as follows:

(1) With respect to the concept of one metropolitan school district, embracing the area designated in Figure 1, attached to the Court's opinion in *Indianapolis II*, it is apparent that some advantages would be obtained from such a system. To name a few, a uniform tax base would be provided for the education of the more than 200,000 pupils in the combined system, and economy in operation could be achieved through central purchasing and reduction of administrative overhead. Complete desegregation would be simplified. On the other hand, it may be that such a system would be too large in terms of difficulty of administration and remoteness of the central office from school patrons.

(2) With respect to the concept of creating various new metropolitan districts—for example, six or eight to replace the present twenty-four pictured on Figure 1, it is apparent that some of the advantages above noted would be reduced, and some of the disadvantages improved. Another alternate, of course, would be to create one metropolitan system for taxing purposes, which in turn would be subdivided into several semi-autonomous local districts. So long as IPS and the local districts are each effectively desegregated, the method used would be constitutionally immaterial.

(3) With respect to the concept of permitting the present school corporations shown on said Figure 1 to remain as is, insofar as geography and control is concerned, such a solution would of course preserve local

autonomy, and this Court would have no reason to disapprove such a solution, so long as each such corporation is required to participate in the desegregation of IPS. Put in other terms, local autonomy for such corporations is, under the law of Indiana, a privilege—not a right—all as discussed in detail in *Indianapolis II*. The consideration for permitting the various corporations to continue their separate existences might therefore be stated to be their participation in a meaningful plan to desegregate IPS. Some of the pertinent facts which the General Assembly may wish to consider in this regard are set out in the next two sections hereof.

V. *Transfer of Pupils*

When speaking of the transfer of pupils, the first logical question is as to the numbers involved. In this connection, the focus must be on the elementary schools within IPS which were not affected by the interim plan adopted by the Court for the present school year, and which have an enrollment of Negro pupils exceeding 80%. There are nineteen such schools, fourteen of which have Negro enrollments in excess of 97%. Two additional schools have enrollments exceeding 60%, and should also be considered. The total enrollment of black students in these 21 schools, excluding kindergarten and special education students, is approximately 11,500.

The General Assembly might order the exchange of all or a substantial part of these 11,500 students with students from the suburban school corporations. For purpurposes of illustration, if it were determined to desegregate such schools on the basis of approximately 85% white—15% black, then about 9,775 black children would need to be transferred to suburban schools, and about the same number of non-black children would need to be transferred to IPS.

There is case law to the effect that transfers of students must be made on an approximately equal basis in-

sofar as the races are concerned, unless there is good reason why this should not be done. In such cases it has been held that to impose the "burden" of being transported wholly or largely upon students of one race is yet another form of racial discrimination and in violation of the Fourteenth Amendment rights of the group transported. United States v. Texas Education Agency, 467 F.2d 848 (5 Cir. 1972); Lee v. Macon County Board of Education, 448 F.2d 746 (5 Cir. 1971); Haney v. County, Board of Education of Sevier County, 429 F.2d 364 (8 Cir. 1970). Such cases, if followed, would seem to mandate so-called "two-way" busing, absent compelling reasons to the contrary.

The Supreme Court has not specifically addressed itself to this question. However, it is worthy of note that in McDaniel v. Barresi, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971), that Court approved a desegregation plan adopted by the Clarke County (Ga.) Board of Education which reassigned pupils in five heavily Negro "'pockets'" to other attendance zones, busing many of them, without any corresponding busing of whites. Other "one-way" busing plans have likewise been approved, depending on the factual setting. Hart v. County School Board, 459 F.2d 981 (4 Cir. 1972); Norwalk Core v. Norwalk Board of Education, 423 F.2d 121 (2 Cir. 1970). Indeed, the Fourth Circuit has flatly held that a pattern of assigning Negro students to formerly all-white schools, without requiring similar travel on the part of whites, does not violate the equal protection clause of the Fourteenth Amendment. Allen v. Asheville City Board of Education, 434 F.2d 902 (4 Cir. 1970). Moreover, analysis of the cases cited in the preceding paragraph indicates that they have been decided on their particular facts, even though some of the language is in terms of absolute requirements.

The Court does not find it necessary to attempt to resolve this question in terms of constitutional absolutes,

nor could it appropriately do so on the present record, since the question has not been squarely presented. However, the record does contain undisputed evidence that virtually all of the twenty-one IPS elementary schools above referred to (located as shown on Figure 13, attached) are substantially out of line with the requirements of present Indiana law and regulations establishing minimum acreage requirements for elementary schools. The regulations require seven acres for schools with 200 or less pupils, plus an additional acre for each additional 100 pupils or major fraction thereof. Burns' Indiana Rules & Regs., § (28-415)-3. As reflected in Figure 14, attached, only one of these schools meets acreage requirements. Most schools are grossly deficient in the space required—for example, the pupil density at School 66 is 544.21 pupils per acre, and is 493.57 per acre at School 42 and 481.33 per acre at School 73. By way of comparison, the pupil density at School 42, taking into consideration its enrollment and the State formula, should be 57.58 pupils per acre. It is thus overcrowded by 857.18%!

The evidence further shows that, with a few exceptions, the twenty-one schools in question are among the older schools in the IPS system—some, dating back 100 years, more or less. Although there is no evidence that the Board of School Commissioners has not maintained such schools as well as could be expected under the circumstances, it is a fair inference, subject to further proof, that the type of construction, use of flammable materials, etc., would fail by a wide margin to meet safety standards for newly constructed schools. On the other hand, the evidence discloses that the school plants maintained by added defendant school corporations are, for the most part, relatively new and in compliance with acreage and safety standards.

On the basis of the foregoing facts, therefore, this Court would not feel justified in condemning out of hand a "one-way" suburban busing plan involving pupils from

such of the twenty-one schools as may seem to the Board on analysis, to afford inadequate educational plant facilities, viewed in the light of current standards. Additionally, such a plan would involve transportation of substantially fewer pupils, and therefore be less expensive.

Finally, unless convinced to the contrary by additional evidence in an appropriate hearing, this Court is not prepared to characterize busing as an unmitigated "burden." Although it might appear to a child to be "burdensome" to be derived of walking to school in the warm days of May and September (which presupposes that children do not like to ride in motor vehicles with their neighborhood friends—a somewhat novel concept to the Court), the Court doubts that it would seem such a burden to be transported in a heated bus through the rain, sleet, and snow so familiar in this latitude during other months of the school term. As pointed out in *Indianapolis II*, nearly 80% of suburban pupils (more than 80% since the elimination of Greenfield) are bused to school at the present time, without complaint.

The Court is not of the opinion that it would be wise to require transportation of kindergarten pupils, primarily because of their age, nor to transport special education pupils because of the various special problems which would inevitably arise in this regard. Further, the Court recognizes that special problems arise with respect to high school pupils, which might render their transfer counterproductive once their high school training has begun. As to pupils in grades 1-8, however, the Court knows of no reason why transfer of pupils, in whatever fashion the General Assembly may elect, would not be reasonable and practical to accomplish the constitutional duty imposed by the Supreme Court, with the understanding, of course, that a transferred elementary pupil would thereafter routinely continue to be transferred to the same transferee school corporation for continued education through high school.

If, for example, transfers were made of Negro pupils from those of the twenty-one schools failing to meet modern standards to the schools of added defendants situate within the geographical area depicted in said Figure 1, all of those transferred would be afforded education in a desegregated setting. It should be no great task to desegregate the remaining school or schools within IPS. The Court estimates, based on the statistics and projections in the record, that it would be necessary for the suburban schools within such Figure 1 area, excluding the Washington Township and Pike Township schools, to accept transfer of IPS elementary pupils in grades 1-8 in number equivalent to approximately 15% of their 1973-74 enrollments in the same grades in order to accomplish this result.

After such transfers were accomplished, the racial percentages in each school to which transfers were made would be approximately 87% white and 13% Negro—a ratio which, by coincidence, would approximate that of the nation as a whole. As regards Washington Township, its minority percentage as projected for the present school year is already this high, so that general 1-8 transfers to this defendant would not appear to be indicated; however, the acceptance of pupil initiated transfers from IPS to its Everett J. Light Industrial Center, to the extent that vacancies exist, might well be required. Pike Township likewise has a substantial minority percentage at this time; however, a number of transfers sufficient to increase such percentage to a figure approximating that of the other suburban schools should be considered.

VI. *Costs and Mechanics of Transfers*

One advantage of the dual transfer system would be that if approximately equal numbers of pupils were transferred to and from suburban schools, tuition, transportation, and other costs would balance out as between IPS and the various other corporations, and no additions

to school plants would be necessary. On the other hand, more pupils would be transported, thus increasing this total cost, and such a system would continue the use of the IPS antique buildings and grounds.

A one-way transfer plan would involve substantial tuition payments from IPS to the transferee schools. To the extent that such tuition applied only to the actual per capita cost of instruction, utilities, maintenance service, etc., no hardship would be imposed upon IPS, because it is apparent that IPS expense for such services would be correspondingly reduced. However, the present transfer law, IC 1971, 20-8.1-6-1 through 20-8.1-6-15, as amended, Burns' §§ 28-5001 through 28-5015, also contemplates charges related to the fair value of the transferee school plant, tax levies for building purposes, and other items related to capital outlay of the transferee school. Considering that the State of Indiana is itself at fault in this matter, as previously found, the General Assembly should consider whether the State should be required to contribute the necessary amount to compensate the transferee corporations for the use of their respective plants. Such a provision, with an appropriate formula, could be adopted as an amendment to the existing transfer law.

It is possible that the General Assembly could discharge its duty in this matter simply by amending the existing transfer law. The purpose of such law, as the Court understands it, is to permit the better accommodation of school children. As pointed out in Section III hereof, the Supreme Court of the United States has held that for a minority child to be compelled to attend a segregated school denies the Fourteenth Amendment rights of such child: in effect, the child is not properly accommodated. Therefore, if the transfer law were amended to recognize transfers to accomplish desegregation of a school system which has been finally adjudged

to have been segregated *de jure* (as is true in the case of IPS), a basis would be established for other necessary changes regarding time of payment of tuition, the share to be borne by the State, the matter of responsibility for and payment of the cost of transportation, and similar details. Since the actual number or percentage of pupils to be transferred is more of an administrative detail than a legislative function, this matter could be left to the discretion of the local school board or boards, subject to the approval of the court having jurisdiction of the case.

VII. *Vacation of Certain Previous Orders*

The various orders contained in *Indianapolis II*, and heretofore stayed by the Court, requiring certain transfers of pupils from IPS to added defendants are each vacated and set aside. It should be understood, however, that the reason for this ruling is simply that it would be inconsistent to permit such orders to stand, although stayed, inasmuch as the General Assembly, in the exercise of its discretion, may desire to adopt an acceptable plan which would be inconsistent with such orders.

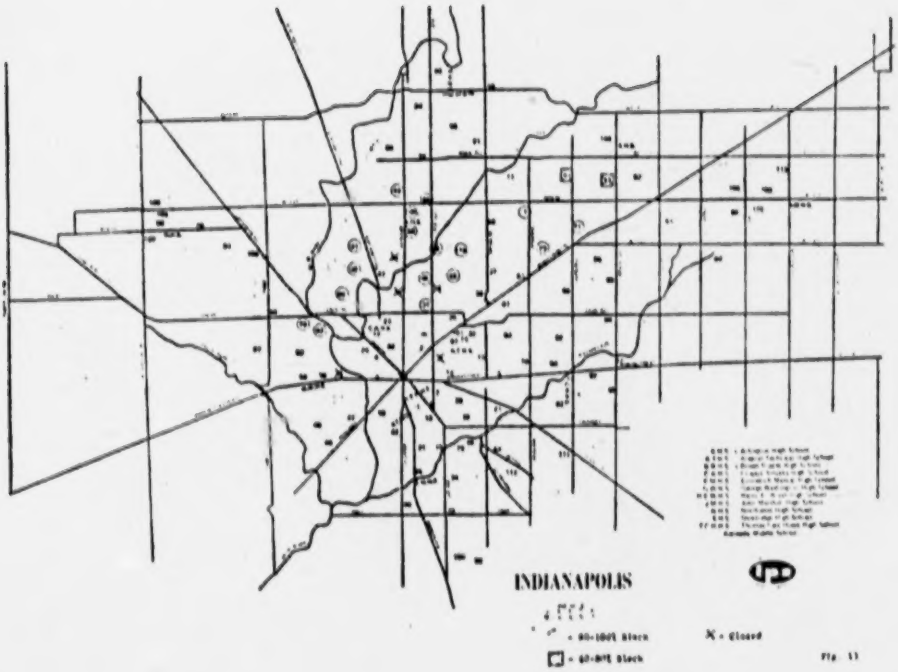
Moreover, the 5% order contained in *Indianapolis II* was designated as a mere interim order, it having been the Court's opinion that such amount of transfers would have been the most which could reasonably be expected to be accomplished within the limited time between the date of the order and the beginning of the 1973-74 school term. As it happened, added defendants were able to convince the Court that even this limited relief could not be accomplished within the time available, hence the stay. At this time the Court looks forward to a permanent solution to the problem of desegregating IPS, which will either come from the General Assembly, as it should, or from this Court in the event of legislative default. From what has been said herein, it should be apparent that the Court does not at this time consider

5% transfers as an adequate permanent solution. Indeed, if the solution is handed back to the Court by default, additional scrutiny will necessarily be given to complete consolidation along metropolitan lines.

However, by vacating its previous orders, it is not the intention of the Court to render moot the appeals now being prosecuted by added defendants. To the contrary, the Court is of the opinion that its conclusions of law as contained in *Indianapolis II*, as modified and supplemented herein, regarding the duty of the State to desegregate IPS, the State's power to adopt a metropolitan plan or transfer plan for such purpose, and the duty of the Court to promulgate such a plan in default of State action within the time presented, all involve controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from such rulings will materially advance the ultimate termination of this litigation. It is therefore respectfully suggested that the Court of Appeals determine said appeals on the merits, as provided in 28 U.S.C. § 1292(b).

Further, the Court in its previous order of July 20, 1973, *Indianapolis II*, entered the following: "All defendants who have not done so are directed to institute appropriate in-service training courses for their respective faculties and staff, and otherwise to orient their thinking and those of their pupils toward alleviating the problems of segregation." This order was not, and is not stayed, and neither is it vacated. It therefore remains as a continuing and final order, operating against added defendant school corporations, and accordingly does not appear to be moot.

[See following illustration]



A	B	C	D	E	F	G
1	853	3.4	14	250.88	60.92	411.81
27	845	1.75	13	482.85	65.00	742.84
41	1157	3.0	17	385.66	68.05	566.73
42	691	1.4	12	493.57	57.58	857.18
43	811	2.6	13	311.92	62.38	500.03
44	1036	3.5	15	296.00	69.06	428.61
45	884	2.5	14	353.60	63.14	560.02
48	589	3.6	11	163.61	53.54	305.58
53	1068	10.0	16	106.80	66.75	160.00
56	655	1.7	12	385.29	54.58	705.91
60 **	1152	2.9	17	397.24	67.76	586.24
63	383	1.5	9	255.33	42.55	600.07
66	1034	1.9	15	544.21	68.93	789.51
71	1274	8.2	18	155.36	70.77	219.52
73	1083	2.25	16	481.33	67.68	711.18
75	793	1.75	13	453.14	61.00	742.85
76	594	1.5	11	396.00	54.00	733.33
83	496	11.0	10	45.09	49.60	-9.10
110	1296	10.6	18	122.26	72.00	194.26
Ken.*	552	1.5	11	368.00	50.18	733.35

** School 60 and Mapleton-Fall Creek School

* Kennedy Middle School

A—Elementary Schools

B—September 1972 Enrollment

C—Acreage of School Site

D—Minimum State Required Acreage

E—Pupils Per Actual Acre

F—Pupils Per Minimum Required Acre

G—Percent Overcrowded

Fig. 14

FILED
AUG 18 1980
MICHAEL RODAK, JR., CLERK

No. 80-129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL.,
Petitioners,

vs.

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY INDIANA, IN OPPOSITION.

DONALD A. SCHABEL,
One Indiana Square, Suite 3300,
Indianapolis, Indiana 46204,
(312) 632-2670,
Attorney for Respondent The Metropolitan School District of Perry Township, Marion County, Indiana.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

QUESTION PRESENTED.

Whether the question of the adequacy of the remedy approved by the courts below, which is presented for review by the petitioner The Board of School Commissioners of the City of Indianapolis, Indiana, in No. 80-129, is moot where, after the judgment of the court of appeals sought to be reviewed was entered, the said petitioner opposed the motions filed by this and other respondent school districts for stay of mandate pending the filing by them of petitions for writs of certiorari in Nos. 79-1975 and 79-2067 and represented to the court of appeals that it was ready, willing and able, and indeed constitutionally required, to implement the one-way interdistrict busing remedy whose adequacy it now seeks to challenge and where the prevailing parties below have not made a similar challenge to the adequacy of such remedy.

LIST OF PARTIES.

The Metropolitan School District of Perry Township, Marion County, Indiana, which is designated in the caption of the petition as a "petitioner," and all of the other parties to the proceedings in the court of appeals except The Board of School Commissioners of the City of Indianapolis, Indiana, which are designated in the list of parties on page ii of the petition as "petitioners" and "other parties" should be designated "respondents" in this Court by reason of Supreme Court Rule 19.6. Likewise, since The Board of School Commissioners of the City of Indianapolis, Indiana was not a prevailing party below, its petition for a writ of certiorari is not properly designated as a "cross petition," and it has improperly designated itself as "cross-petitioner" in the caption.

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Other Authorities.

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No. 80-129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL.,
Petitioners,

vs.

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY INDIANA, IN OPPOSITION.

STATEMENT OF THE CASE.

Petitioner The Board of School Commissioners of the City of Indianapolis, Indiana, operates the Indianapolis Public Schools (commonly referred to as "IPS"). On August 18, 1971, the district court, in a wide-ranging opinion,[1] held that IPS is an

1. Excerpts from this opinion are printed in the IPS Appendix, pages 1a-9a. Other appendices to which reference will be made in

(Footnote continued on next page.)

unconstitutionally segregated dual-school system. *United States* v. *Board of School Commissioners etc.*, 332 F. Supp. 655 (S. D. Ind. 1971), *affirmed*, 474 F. 2d 81 (7th Cir. 1973), *cert. denied*, 413 U. S. 920 (1973). It thereafter allowed respondents Donny Brurell Buckley and Alycia Marquese Buckley to intervene as plaintiffs representing a class of school-age Negro children residing in the area served by IPS and to file a complaint against other school corporations in Marion and adjoining counties seeking interdistrict relief. In denying motions by this respondent and others to docket the Buckley action as a separate civil action from the action decided by the district court's opinion of August 18, 1971, the district court held:

> "The Court recognizes that the main thrust of the added defendants' various motions to dismiss the intervening plaintiffs' amended complaint, or to sever and redocket the same as a separate action is that they cannot be bound by the findings made in this cause before they were made parties. This position is valid. Therefore, the action of the Court in overruling such motions is without prejudice to the right of such added defendants, on trial, to offer evidence in defense of the issues raised in both the original complaint and the intervening complaint, as amended, and the burden of proof as to the issues raised by the intervening complaint shall continue to be on the intervening plaintiffs, unaided by the findings of the Court entered before the joinder of the added defendants." (Entry for December 30, 1971)[2]

The claim asserted by respondents Buckley for interdistrict relief was first tried in 1973. In an opinion issued on July 20,

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(Footnote continued from preceding page.)
this brief are the appendix bound with this brief, the Joint Appendix filed with the petitions in Nos. 79-1975 and 79-2001 and the Supplemental Appendix filed with the petition in No. 79-2067.

2. The reference on page 6 of the IPS petition to findings of racial discrimination in housing contained in the 1971 opinion are thus irrelevant. In addition, the court of appeals held in its 1980 opinion that such findings in the 1971 opinion cannot support an interdistrict remedy. (Joint Appendix, pages A12-A13)

1973,[3] the district court held that a desegregation plan limited to IPS would cause white flight and not be viable and that the only feasible desegregation plan would involve the crossing of the boundary lines between IPS and adjacent or nearby school districts. Although the court expressly found that "there is no evidence that any of the added defendant school corporations have committed acts of *de jure* segregation directed against Negro students living within their respective borders" (IPS App. 29a), it went on, by way of *obiter dictum*, to place the blame for the concentration of blacks in the inner cities of America on racial discrimination in housing. That such *dicta* were not intended to be treated as findings of fact was made clear by the court in the following disclaimer:

> "The foregoing should not be taken to mean that this action is one having to do with discrimination in housing, and this Court does not consider that a school desegregation action is one in which it is appropriate to attempt to remedy such discrimination, past or present. * * *" (IPS App., page 32a)[4]

The holding of the district court that an IPS only plan would not be viable because of white flight was reversed by the court of appeals on August 21, 1974, 503 F. 2d 68, and the case was remanded for the prompt formulation of a decree directed to eliminating the segregation found to exist within IPS, the court of appeals observing:

> "* * * We must guard against permitting the 'white flight' considerations unduly to delay complete desegregation within IPS now that Milliken v. Bradley has disposed of the metropolitan remedy." (503 F. 2d at 80)

The court of appeals also instructed the district court to "determine whether the establishment of the Uni-Gov boundaries

3. 368 F. Supp. 1191. The July 20, 1973, opinion of the district court is printed in full in the IPS Appendix, pages 10a-44a.

4. Thus, the reference in the IPS petition on page 6 to racial discrimination in housing found in the 1973 opinion is also irrelevant.

without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken*." (503 F. 2d at 86)

Upon trial in 1975 pursuant to the foregoing remand, IPS took the positions (1) that it could implement a unitary school system within its own boundaries if permitted to do so and (2) that the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries did not warrant an interdistrict remedy. From the judgment entered by the district court on August 1, 1975,[5] ordering an interdistrict remedy,[6] IPS appealed and maintained the same positions on appeal. The court of appeals affirmed on July 16, 1976,[7] but this judgment was vacated by the Supreme Court on January 25, 1977, 429 U. S. 1068, and the case was remanded for further consideration by the court of appeals. In turn, the court of appeals on February 14, 1978,[8] vacated the district court's judgment of August 1, 1975, and remanded the case to that court for further findings of fact on whether the relevant acts or omissions of state or local officials were motivated, at least in part, by a racially discriminatory purpose.

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5. 419 F. Supp. 180. The August 1, 1975, opinion of the district court is printed in full in the Supplemental Appendix, pages A36-A47.

6. The August 1, 1975, opinion of the district court stated "that the Buckley plaintiffs should be regarded as the 'prevailing parties,' within the meaning of [20 U. S. C. § 1617], if the rulings of this Court relating to transfer of pupils become final, since they are the only parties who have contended for a remedy going beyond the IPS strait jacket." (Supplemental Appendix, pages A46-A47)

7. 541 F. 2d 1211. The July 16, 1976, opinion of the court of appeals is printed in full in the Supplemental Appendix, pages A1-A35.

8. 573 F. 2d 400. The February 14, 1978, opinion of the court of appeals is printed in full in the Joint Appendix, pages A54-A83.

Following remand, the district court on April 7, 1978,[9] determined that the existing record was sufficient for purposes of making the findings required by the mandate and that no further evidentiary hearing need be had. Thereafter, on May 8, 1978, IPS filed a motion asking the district court to realign IPS as a party plaintiff on the issues of interdistrict violation and remedy and to permit a further evidentiary hearing on the issues relating to an interdistrict constitutional violation.[10] The district court did not immediately rule on the IPS motion and adhered to the procedure outlined in its entry of April 7, 1978. On July 11, 1978, the district court filed its memorandum of decision[11] and entered a judgment reinstating its previous judgment of August 1, 1975, which had been vacated by the court of appeals.

Appeals by IPS and most of the respondents were taken from the district court's judgment of July 11, 1978, and IPS moved in the court of appeals for a limited remand for district court consideration of alternative remedy proposals. The IPS motion stated:

> "Ordering such a remand at this stage will *not* decide the pending appeals from the July 11 order insofar as they relate to intent and the existence of a so-called interdistrict violation at all. That issue will be preserved for decision on the pending appeals and can be consolidated for review with all appeals from the District Court's ruling on the remand." (Motion for limited remand, page 9, note 5)

The IPS motion was granted by the court of appeals on August 11, 1978.[12] In remanding the case to the district court for the

9. The district court's entry for April 7, 1978, is printed in the appendix bound with this brief, page A1, *infra.*

10. The IPS motion is printed in the appendix bound with this brief at pages A2-A3, *infra.*

11. 456 F. Supp. 183. The July 11, 1978, opinion of the district court is printed in the Joint Appendix, pages A84-A100.

12. The August 11, 1978, order for limited remand is printed in the appendix bound with this brief, pages A4-A6, *infra.*

limited purpose of hearing and deciding upon modifications of the judgment of July 11, 1978, as to remedy, the court of appeals preserved for its own decision the issues concerning the existence of any interdistrict violation at all.[13]

Following receipt of the mandate of the court of appeals on the limited remand, the district court on September 20, 1978,[14] denied the motion of IPS to be realigned as a party plaintiff. The court noted that in all of the proceedings theretofore had the positions of the respondents Buckley and IPS had been adverse and still were, and that once this litigation is terminated IPS may well be liable for substantial attorneys' fees to counsel for respondents Buckley as the prevailing parties. The court further observed that IPS may seek any relief against the respondent school corporations to which it feels entitled by cross-claim. No such cross-claim has been filed by IPS seeking an interdistrict school desegregation remedy.

At the trial on the limited remand, respondents Buckley opposed the alternative remedies urged by IPS and supported the one-way interdistrict busing remedy previously ordered by the court. On April 24, 1979,[15] the district court filed its memorandum of decision in which it reapproved the one-way interdistrict busing remedy and rejected the alternative two-way interdistrict busing remedies proposed by IPS[16] Judgment was entered by the district court on July 9, 1979.[17]

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13. Thus, IPS had no part in establishing the existence of the interdistrict violations found by the district court and cannot be deemed a prevailing party on that aspect of the case.

14. The district court's entry for September 20, 1978, is printed in the appendix bound with this brief, pages A7-A10, *infra.*

15. The April 24, 1979, opinion of the district court is printed in the Joint Appendix, pages A101-A129.

16. The district court found that the attorneys for the respondents Buckley, as the prevailing parties, are entitled to attorneys' fees. (Joint Appendix, page A128)

17. The July 9, 1979, judgment of the district court is printed in the Joint Appendix, pages A130-A135.

IPS appealed from the district court's judgment of July 9, 1979, and argued that the one-way relief ordered by the district court was inadequate to redress the effects of the interdistrict violations found and discriminatory and unfair to black students. The court of appeals rejected the IPS arguments and on April 29, 1980,[18] affirmed both the findings of constitutional violations[19] and the appropriateness of the one-way relief.

Following the decision of the court of appeals, this respondent and others moved in the court of appeals on May 12 and 16, 1980, for a stay of mandate pending application to the Supreme Court for writ of certiorari. Although IPS had opposed the one-way interdistrict busing remedy in the district court as inadequate and had argued the same on appeal, it now abandoned its opposition to implementation of the one-way remedy and filed a response urging the court of appeals to deny the motions for stay of mandate.[20] In its response IPS represented to the court of appeals that it was prepared to implement the district court's judgment in the Fall of 1980 and gave no indication that it itself intended to seek review of the adequacy of the remedy by filing a petition for certiorari. Just as IPS had previously switched sides on the issue of interdistrict constitutional violations, in the response it switched sides on the one-way busing remedy and supported its implementation. However, on May 29, 1980, the

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18. The April 29, 1980, opinion of the court of appeals is printed in the Joint Appendix, pages A-1-A53, and its judgment of the same date at pages A136-A137.

19. The issues concerning the existence of interdistrict violations on the appeals from the July 11, 1978, judgment of the district court had been preserved for decision by the court of appeals in the limited remand order.

20. The response of Indianapolis Public Schools (IPS) to motions of added defendants Perry and Lawrence Townships, et al., for stay of mandate, filed on May 22, 1980, is printed in the appendix bound with this brief, pages A11-A21, *infra.*

court of appeals granted the motions for stay of mandate with respect to the interdistrict remedy.[21]

SUMMARY OF ARGUMENT.

In opposing the motions for stay of the mandate on the judgment entered by the court of appeals affirming the district court's judgment, petitioner IPS waived its previous opposition to the one-way interdistrict busing plan and consented to its implementation. This Court does not consider errors in judgments that have been waived by consent.

Petitioner IPS is the only party not presently contesting the existence of any interdistrict constitutional violation at all that is seeking to have this Court review the adequacy of the remedy. But in going beyond what was required of it by the judgment sought to be reviewed, petitioner has mooted its case.

ARGUMENT.

In opposing the motions for stay of the mandate on the judgment entered by the court of appeals on April 29, 1980, affirming the district court's judgment of July 9, 1979, petitioner IPS clearly waived its previous opposition to the one-way interdistrict busing plan embodied in the latter judgment and consented to its implementation. With Emersonian disdain for consistency,[22] IPS now argues in its petition for a writ of

21. The May 29, 1980, order of the court of appeals is printed in the appendix bound with this brief, pages A22-A23, *infra*.

22. "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do. He may as well concern himself with his shadow on the wall. Speak what you think now in hard words and tomorrow speak what tomorrow thinks in hard words again, though it contradict everything you said today. * * *" Essay on Self-Reliance in "The Best of Ralph Waldo Emerson," page 127. (Walter J. Black: New York: 1941)

certiorari that the remedy it urged the court of appeals to permit it to implement is inadequate and inequitable and should not be implemented.

This Court does not consider errors in judgments that have been waived by consent. In *Pacific Railroad Company of Missouri* v. *Ketchum,* 101 U. S. 289 (1880), it was said:

> "* * * If, when the case gets here, it appears that the decree appealed from was assented to by the appellant, we cannot consider any errors that may be assigned when they were in law waived by the consent, * * *" (101 U. S. at 295)

The prevailing parties below, respondents Buckley, have consistently supported the one-way busing remedy. Respondent United States, the original plaintiff in the intradistrict action against IPS, did not seek interdistrict relief, and, in any event, has not petitioned for certiorari to review the judgment below. It is the position of the respondents who have filed petitions for certiorari to review the judgment of the court of appeals in this case[23] that there has been no interdistrict constitutional violation at all that would support an interdistrict remedy of any nature. Consequently, petitioner IPS is the only party not presently contesting the existence of the interdistrict constitutional violations that is seeking to have this Court review the adequacy of the remedy. But petitioner IPS has mooted its case by consenting to the remedy when it opposed the respondents' motions for stay of mandate.

It is well established that an unsuccessful litigant does not moot his case by complying with an unfavorable judgment pending the disposition of his appeal, but he does moot his case by going beyond what is required of him. Thus, a debtor does not moot his case by paying the judgment against him

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23. Petitions for writ of certiorari filed by respondents herein have been docketed as Nos. 79-1975, 79-2001, 79-2067, 80-99 and 80-115.

pendente lite, but he does moot his case by entering into a compromise in settlement of the debt. *Dakota County* v. *Glidden*, 113 U. S. 222 (1885). And if a union is enjoined from boycotting or striking at a particular store, the union does not moot the case by lifting the boycott or strike pendente lite, *Bakery Drivers* v. *Wagshal*, 333 U. S. 437 (1948), but the union might well moot its case if all the striking employees left the store and obtained employment elsewhere, *see Mancusi* v. *Stubbs*, 408 U. S. 204, 218 (1972) (Marshall, J., dissenting). Likewise, a petitioner does not moot his case by obeying a judgment without first seeking a stay of mandate, *Mancusi* v. *Stubbs, supra*, but he does moot his case by complying with a judgment when a stay has been granted, *see, Bakery Drivers* v. *Wagshal, supra*, at 442.

In opposing the motions for stay of the mandate on the judgment entered by the court of appeals on April 29, 1980, and in seeking to implement the district court's judgment of July 9, 1979, which the court of appeals had affirmed, petitioner went far beyond what was required of it. The result is that the question of the adequacy of the remedy ordered by the courts below, which is presented by the petition of IPS in No. 80-129 for a writ of certiorari, is moot.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari filed by The Board of School Commissioners of the City of Indianapolis, Indiana, should be denied.

Respectfully submitted,

DONALD A. SCHABEL,
One Indiana Square, Suite 3300,
Indianapolis, Indiana 46204,
(317) 632-2670,
Attorney for Respondent The Metropolitan School District of Perry Township, Marion County, Indiana.

APPENDIX.

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

* * Caption—No. IP 68-C-225 * *

ENTRY FOR APRIL 7, 1978

S. Hugh Dillin, Judge

The Court, having considered the order of the Court of Appeals for the Seventh Circuit remanding this cause for further findings, is of the opinion that the present record is sufficient for such purpose, and that no further evidentiary hearing need be had.

It is therefore considered and ordered that all of the parties desiring to be heard on the issues presented on remand file their briefs in support of their respective positions in the office of the Clerk on or before May 22, 1978. Answer briefs may be filed on or before June 2, 1978, and this will conclude the briefing. There will be no oral argument.

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

United States of America,
Plaintiff,
and
Donny Brurell Buckley, et al.,
Plaintiff-Intervenors,
vs.
The Board of School Commissioners of the City of Indianapolis, et al.,
Defendants.

No. IP 68-C-225

MOTION TO REALIGN PARTIES AND TO PERMIT EVIDENTIARY HEARING ON THE BASIS FOR AN INTERDISTRICT REMEDY

Defendants, Board of School Commissioners and Superintendent (hereafter "IPS") hereby move the Court as follows:

1. To realign IPS as a party-plaintiff on the issues of interdistrict violation and remedy, interdistrict relief ancillary to pupil assignments and state responsibility for both interdistrict violations and assistance in effectuating the appropriate remedy.

2. To permit a further evidentiary hearing on the issues relating to an interdistrict constitutional violation.

3. In the event the Court, after such hearing, finds one or more interdistrict constitutional violations, to hold a subsequent hearing on the appropriate remedy in light of the violation or violations found, at which any relevant proposals or plans of school authorities may be submitted and considered.

In support of its motion IPS submits herewith a memorandum outlining its reasons for requesting a further evidentiary hearing and the nature of the evidence which IPS would expect to introduce.

Respectfully submitted,

/s/ John Wood
John Wood

/s/ Sigmund J. Beck
Sigmund J. Beck
Attorneys for Board of School Commissioners of the City of Indianapolis

Bamberger & Feibleman
500 Union Federal Building
Indianapolis, Indiana 46204
(317) 639-5151

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 11, 1978.

Before

Hon. Thomas E. Fairchild, *Chief Judge*
Hon. Luther M. Swybert, *Circuit Judge*
Hon. Philip W. Tone, *Circuit Judge*

United States of America,
Plaintiff-Appellee,

Donny Brurell Buckley and Alycia Marquese Buckley, etc., et al.,
Intervening Plaintiffs,

Nos. 78-1996 thru 78-2006, and 78-2039

vs.

The Board of School Commissioners of the City of Indianapolis, Indiana, the Metropolitan School District of Perry Township, Marion County, Indiana, and the Superintendent of Schools, President and Members of the Board of School Commissioners, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Div. No. IP 68 C 225.

Judge S. Hugh Dillin

ORDER

This matter comes before the court upon the filing of the following documents:

1. The "MOTION OF INDIANAPOLIS PUBLIC SCHOOLS FOR LIMITED REMAND FOR DISTRICT COURT CONSIDERATION OF ALTERNATIVE REMEDY PROPOSALS" filed by the Indianapolis Public Schools on August 2, 1978;

2. The "RESPONSE IN OPPOSITION TO 'MOTION OF INDIANAPOLIS PUBLIC SCHOOLS FOR LIMITED REMAND FOR DISTRICT COURT CONSIDERATION OF ALTERNATIVE REMEDY PROPOSALS'" filed by Metropolitan School District of Lawrence, Warren and Wayne Townships on August 7, 1978;

3. The "MOTION FOR STAY PENDING APPEAL" filed by Metropolitan School District of Perry Township, Marion County, Indiana on August 7, 1978; and

4. The "MOTION OF APPELLANTS, BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL., FOR TEMPORARY RETENTION OF RECORD IN DISTRICT COURT UNDER F. R. A. P. 11(c)" filed by Board of School Commissioners of the City of Indianapolis, its Superintendent and members on August 7, 1978.

On consideration thereof, IT IS ORDERED, that this cause is remanded to the district court for the limited purpose of hearing and deciding upon modifications of the July 11th judgment in the nature of alternative remedy, plans and related evidence proffered by IPS (as well as any alternatives, objections, modifications, and rebuttal of any opposing parties) and hearing and making additional findings upon further evidence offered by any parties on the issue of which alternative remedy (including pupil reassignment, ancillary relief, and allocation of desegregation costs) is necessary and equitable to overcome the combined effect of all the constitutional violations previously found by the district court. Pending the determinations of the district court on this limited remand, and also for the convenience of counsel in preparing their briefs on appeal, the record shall be retained in the district court until further order.

All issues raised by the pending appeals, including but not limited, to intent and the existence of any interdistrict violation at all are preserved for decision by this court on the pending appeals and such subsequent appeals as may be filed from the orders of the district court on this limited remand.

This court assumes that the district court will rule upon the various motions for stay of the July 11, 1978 judgment pending appeal prior to the commencement of the 1978-1979 school session. And upon that assumption, this court defers ruling on the motions for stay filed in this court.

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

(* * Caption—No. IP 68-C-225 * *)

ENTRY FOR SEPTEMBER 20, 1978

This cause comes before the court on the motion of the original defendant IPS to be realigned as a party plaintiff. As the basis for such unusual request it alleges that it and the original plaintiff are agreed as to the adequacy of its proposed intradistrict desegregation plan, and that it adopts the interdistrict complaint of intervening plaintiffs Buckley, et al. The motion is denied.

In the first place, the intervening plaintiffs Buckley do not agree with the IPS intradistrict plan, but have opposed it. In the second place, IPS has only recently changed its position because the last school board election changed the views of the Board of School Commissioners on the subject of desegregation (i.e., a slate favoring desegregation was elected). The next election may well reverse the Board's position once again. This court should not be required to realign the parties following each election. Further, IPS may seek any relief against added defendants to which it feels entitled by cross-complaint. Another important consideration is that IPS may well be liable for substantial attorneys fees to counsel for the plaintiffs Buckley once this litigation is terminated: this most certainly results in an adverse situation between IPS and the Buckleys.

Various added defendant school corporations have filed their motions asking the court to vacate its entry of June 2, 1978 to the extent that such entry orders the original defendant IPS to formulate a plan for the transfer of black students to added defendants' schools. The motions are each denied as moot.

Finally, there is pending before the Court the applications of numerous attorneys for leave to appear in this cause on behalf of the defendant IPS. The applications of William L. Taylor and Thomas I. Atkins are granted. Those of Louis R. Lucas and Paul R. Dimond are denied.

The record in this case reflects that the said Louis R. Lucas and Paul R. Dimond appeared on October 21, 1971 as attorneys for the intervening plaintiffs Buckley, and, with other counsel, filed an amended complaint on behalf of such parties. Subsequently, in 1973, Lucas and Dimond were permitted to withdraw their appearances for said intervening plaintiffs, on the basis that there were substantial differences of opinion with original counsel for intervening plaintiffs.

Subsequent to the withdrawal of Lucas and Dimond as counsel for the intervening plaintiffs Buckley, said intervening plaintiffs won at least a partial victory in the case in that the Court entered its judgment of August 1, 1975, ordering the transfer of several thousand black students from IPS to the schools of certain added defendant school corporations, and enjoining the erection of additional public housing, except for the elderly, within IPS boundaries. 419 F. Supp. 180, aff'd 541 F. 2d 1211 (7 Cir. 1976), vacated and remanded 429 U. S. 1068 (1977), vacated and remanded 573 F. 2d 400 (7 Cir. 1978). After this Court gave further consideration to said judgment on remand, as ordered, and made additional findings of fact, it again, on July 11, 1978, entered an order identical with that of August 1, 1975, which latter order is now on appeal to the Court of Appeals for the Seventh Circuit.

In all of the proceedings heretofore had in this case, the position of the intervening plaintiffs Buckley and the defendant IPS have been adverse, and this is still true. In earlier proceedings, IPS appealed from this Court's order of August 1, 1975 on the basis that to the extent that it ordered the transfer of black students to suburban schools, it went too far, and was illegal; at this time IPS is appealing the same order on the basis

that it does not go for enough, and is illegal. The plaintiffs Buckley, at least until this point in the proceedings, have consistently defended on appeal the order of this Court.

Further, as pointed out above, the parties are adverse in that the intervening plaintiffs Buckley seek an award of attorneys fees for their original and present attorneys, John O. Moss, John Preston Ward, and Charles D. Kelso, from the defendant IPS, as well as from the added defendants.

The foregoing matters have been brought to the attention of the Court by the response to the Application for Appearance of Attorneys filed by the added defendants The Metropolitan School Districts of Lawrence, Wayne and Warren Townships, and by the objections of the intervening plaintiffs Buckley to the appearance of attorneys Lucas and Dimond. The Court cannot ignore what appears to it to be an obvious violation of the rules of professional responsiblity. See *Schloetter* v. *Railoc or Indiana, Inc.*, 546 F. 2d 706 (7 Cir. 1976); Canons 4 and 9, ABA Code of Professional Responsibility.

From the denial of permission to attorneys Lucas and Dimond to change sides in this case, it necessarily follows that their respective law firms, Ratner, Sugarmon, Lucas and Henderson, Memphis, Tennessee, and O'Brien, Moran and Dimond, Ann Arbor, Michigan, and all members and associates thereof, should be, and they are likewise prohibited from appearing for or counseling with IPS in this action.

This cause is assigned for further hearing on November 6, 1978 at 9:30 a.m., for the purpose of making further findings and orders as to the various matters set out by the Court of

Appeals for the Seventh Circuit in its limited order of remand dated August 11, 1978.

Dated this 20th day of September, 1978.

/s/ S. Hugh Dillin,
S. Hugh Dillin,
Judge

Copies to:

Louis R. Lucas, Ratner, Sugarmon, Lucas and Henderson, 525 Commerce Title Building, Memphis, Tennessee, 38103

Paul R. Dimond, O'Brien, Moran and Dimond, 320 North Main Street, Ann Arbor, Michigan, 48104

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Nos. 78-1800, 78-1971, 78-1996 through
78-2006, 78-2039, 79-1831 through
79-1838, 79-1874 and 79-1875

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

DONNY BRURELL BUCKLEY, ET AL.,
Plaintiffs-Intervenors-Appellees,

vs.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL.,
Defendants-Appellees-Cross-Appellants,

METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, ET AL.,
Added Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana

RESPONSE OF INDIANAPOLIS PUBLIC SCHOOLS (IPS) TO MOTIONS OF ADDED DEFENDANTS PERRY AND LAWRENCE TOWNSHIP, ET AL., FOR STAY OF MANDATE

By motions filed on May 9 and 15, 1980, several of the added defendant-appellant school corporations have sought further delay in the implementation of inter-district relief first ordered in this case almost seven years ago.[1]

1. The initial order to transfer students from IPS to schools of the added school corporations was issued on July 20, 1973 (368

(Footnote continued on next page.)

Defendants Lawrence, et al. and Perry argue that the previous grant of stays in this case justifies the granting of yet another delay. (Perry Motion p. 3, Lawrence Motion p. 2). Contrary to their assertions, however, this case is now in a significantly different posture than it was at the time of the stay issued by the Supreme Court in 1976 and even at the time of the stay issued by this Court on August 8, 1979.

When the Supreme Court remanded the case in 1977 (429 U. S. 1068) it was for reconsideration in light of two specific cases not specifically addressed by this Court in its 1976 opinion,[2] *Village of Arlington Heights* v. *Metropolitan Housing*

(Footnote continued from preceding page.)
F. Supp. at 1209). On August 24, 1974, this Court vacated and remanded for reconsideration in light of the Supreme Court's intervening decision in the *Milliken* case (503 F. 2d 68). On August 1, 1975, the District Court entered a new order substantially similar to the one here at issue requiring transfers of designated numbers of black students in IPS to the eight suburban districts (419 F. Supp. 180). That order was affirmed by judgment of this Court on July 16, 1976 (541 F. 2d 1211). On January 25, 1977, the Supreme Court vacated and remanded for reconsideration in light of the *Davis* and *Arlington Heights* decisions. 429 U. S. 1068. On February 14, 1978, this Court remanded the case to the District Court in a detailed opinion clearly identifying and delimiting the issues remaining in the case (573 F. 2d 400). On July 11, 1978, the District Court entered orders making findings on the issues remanded, directing the submission of specific plans for desegregation and requiring the state defendant to prepare a plan for the in-service training of teachers. After a further remand by this Court on August 11, 1978 to permit consideration of additional evidence on the remaining issues, the District Court scheduled hearings beginning in November, 1978. Those hearings resulted in the April 24, 1979 Memorandum of Decision and the July 9, 1979 order, which this Court affirmed, with a single exception, in its decision of April 29, 1980.

2. *Arlington Heights* of course could not have been considered by this Court since the Supreme Court's decision came after this Court's 1976 decision.

Development Corporation, 429 U. S. 252 [1977] and *Washington* v. *Davis,* 426 U. S. 229 [1976]. Since then there have been several important developments:

1) this Court's Opinion of February 14, 1978 carefully delineating the issues remaining to be resolved and setting out the criteria to be employed by the District Court in determining whether the challenged actions of defendants were infected with a racial purpose;
2) the District Court's July 11, 1978 and July 9, 1979 judgments on racial intent and on inter-district effects and remedy and its memorandum of decision of April 24, 1979 on these subjects; and
3) this Court's decision of April 29, 1980 holding that the District Court's findings of racial purpose in the legislative actions surrounding Uni-Gov and in the housing actions of defendant HACI were supported by the record and that the scope of the remedy ordered did not exceed the scope of the violations found.[3]

Accordingly, the issues that prompted the Supreme Court's remand have now been fully addressed both by the District Court and this Court and, contrary to the situation prevailing when previous stays were granted, no stay is now necessary to permit thorough consideration of the issues at the trial or circuit court levels.[4]

The sole question remaining is whether this Court should stay its mandate in anticipation of decisions by the Supreme Court to review and reverse the decision of this Court.

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3. The single exception to the affirmance—a determination that further proceedings are necessary to determine the effect of the Uni-Gov and HACI violations on added defendants Speedway and Beech Grove—is not involved in these stay proceedings since the two districts at present are not included in the order.

4. Appellants also appear to believe that the prior issuance of stays has determinative precedential significance whether or not circumstances have changed. By their reasoning it would appear that each successive stay would become a precedent for further delay, allowing relief to be postponed indefinitely.

IPS, notwithstanding its claims that the remedy ordered by the District Court and sustained by this Court is inadequate to redress fully the violations that have occurred, is prepared to go forward in the Fall of 1980 with intra and inter-district plans for desegregation. Because the added defendants have offered no persuasive reason in fact or law for additional delay in a case where the vindication of rights has already been so long postponed, IPS opposes the issuance of a stay.

A. The Context for Deciding Stay Requests in Constitutional Cases

Whatever the weight to be given to preservation of the *status quo* in other types of cases, defendants' assertion (Lawrence Motion p. 4) that it is a critical factor in stay applications in school desegregation cases is flatly wrong. As this Court appreciates, stays are not normally granted pending appeals in constitutional cases. Constitutional rights are "present rights . . . not merely hopes to some future enjoyment of some formalistic constitutional promise." *Watson* v. *City of Memphis*, 373 U. S. 526, 533 (1963).

Stays pending appeal of injunctions to remedy the continuing effect of constitutional violations found are therefore rare. In such circumstances, no bond can be given to the victims of the violation to ensure them against the further irreparable injury that would inevitably result from perpetuating the unconstitutional condition by granting a stay pending completion of appellate review. Given the inventiveness of lawyers to appeal from interlocutory orders at various stages of the remedial process in constitutional cases, grants of stays pending appeal would lead inevitably to lengthy delays. In such circumstances, preserving the *status quo* pending appeal would serve only to perpetuate constitutional violations and thereby irreparably harm the victims of the violation and the paramount interest in constitutional government. As a result, the general federal rule is

to deny stays of injunctions designed to remedy constitutional violations pending appellate review.

This general rule has specific force in school desegration cases. At least since *Alexander* v. *Holmes County Board of Education*, 396 U. S. 19 (1969) and *Carter* v. *West Feliciana Parish School Board*, 396 U. S. 266, 290 (1969) the rule has been applied in school cases to require desegregation "now" pending later litigation:

> Continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer permissible. Under explicit holdings of [the Supreme] Court the obligation . . . is to terminate dual school systems at once and to operate now and hereafter only unitary schools. 396 U. S. at 20.

As a result the Supreme Court has refused, absent extraordinary circumstances, to permit delays or stays in implementing desegregation decrees pending appeals, even in situations where review has subsequently been granted by the Supreme Court itself. See, e.g., *Swann* v. *Charlotte-Mecklenburg Board of Education*, 399 U. S. 926 (1970) (reinstating district court judgment pending review); *Edgar* v. *United States*, 404 U. S. 1206 (1971) (Black, J., denying stay); *Jefferson Parish School Board* v. *Dandridge*, 404 U. S. 1219 (1971) (Marshall, J., denying stay). Although *Alexander* dealt with a dual system in the South, the Court has rendered similar decisions in cases involving requests for stays of orders requiring desegregation of Northern school systems found to have engaged in *de jure* acts of segregation. See, e.g., *Board of Education of the City School District of the City of New Rochelle* v. *Taylor*, 368 U. S. 1, 825 S. Ct. 10 (1961) (Brennan, J., denying stay); *Keyes* v. *School District No. 1 of Denver*, 396 U. S. 1215 (1969) (Brennan, J., vacating stay); *Dayton Board of Education* v. *Brinkman*, 429 U. S. 1060 (Aug. 29, 1979) (Stewart, J., denying stay).[5]

5. Justice Stewart's denial of a stay in *Dayton* is particularly significant in view of the subsequent history of the case. The Supreme

(Footnote continued on next page.)

Certainly extraordinary circumstances may arise justifying the issuance of a stay notwithstanding the *Alexander* mandate of "desegregation now." See, e.g., *Corpus Christi School District* v. *Cisneros,* 404 U. S. 1211 (1971) where, unlike this case, Justice Black found that novel issues not previously considered by the Court were presented and that the case was in "an undesirable state of confusion."[6] As we shall demonstrate, added defendants have here presented no extraordinary circumstances which would warrant further delay in desegregation.

B. The Application of Traditional Stay Criteria

In ruling on defendants' applications for a stay, the burden is on defendants to show that:

1) they will suffer irreparable injury if the stay is denied;
2) that they will succeed on the merits of their appeal;
3) that plaintiff will not be substantially harmed by the stay; and
4) that no harm will be done to the public interest.

(Footnote continued from preceding page.)
Court later granted certiorari and reversed and remanded for further proceedings the judgment of the Court of Appeals because of substantial error in the handling of the case below. 433 U. S. 406 (1977). Nevertheless, the Court permitted the plan to continue in effect. When the case returned, Justices Stewart and Rehnquist denied stays 439 U. S. 1357, 1358 (August 30, 1978) and the Court subsequently upheld the judgment requiring systemwide relief.

6. While it is difficult to pinpoint the "extraordinary circumstances" that led to the issuance of a stay in *Columbus Board of Education* v. *Penick,* 439 U. S. 1348 (Rehnquist, J.) it is important to note that the stay was issued on August 11, 1978 by a single Justice when the Court was not in session. After *Columbus,* all subsequent applications for stays in school desegregation cases have been denied. See, *Dayton Board of Education* v. *Brinkman,* 439 U. S. 1357, 1358 (August 30, 1978) (Stewart, J. and Rehnquist, J.); *Buchanan* v. *Evans,* 439 U. S. 1360 (Sept. 1 and 11, 1978) (Brennan, J. and Rehnquist, J.) (*sub. nom. Alexis I. DuPont School District* v. *Evans*); *Vetterli* v. *United States Disrtict Court,* 435 U. S. 1304 (1978); *Adams* v. *United States,* 48 U. S. L. W. 3750 (May 20, 1980).

In essence the four criteria required weighing the harms to defendants, plaintiffs and the public in the absence or grant of a stay, in light of defendant's chances for succeeding on appeal. The burden is always on the party seeking a stay; and, in evaluating these factsor in cases involving constitutional rights, the general rule against granting delays in remedying the current impact of constitutional violations must be applied. The added defendants simply fail to meet their burden.

1. Success on Appeal Is Unlikely

At this late stage in the proceedings, added defendants have made no substantial showing that they are likely to prevail on the merits.

Almost all of the grounds for reversal alleged (See Lawrence Motion pp. 7-11) are contentions that defendants made to this Court and that were fully considered and rejected. Moreover, these challenges to the holdings of discriminatory intent and inter-district effects are challenges to findings of fact in which both the District Court and this Court have concurred. The Supreme Court ordinarily will not review factual findings made by both lower courts. *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271 (1949).

Most telling, the claim of added defendants that the issues are novel and that they are likely to prevail is decimated by the decisions of the Third Circuit and the Supreme Court in *Evans* v. *Buchanan*, 393 F. Supp. 428 (D. Del., 1975, aff'd, 423 U. S. 963 (1975); 416 F. Supp. 328 (D. Del., 1976), aff'd, 555 F. 2d 373 (3rd Cir., 1977), cert. denied 434 U. S. 880 (1977); 477 F. Supp. 982 (D. Del., 1978), aff'd 582 F. 2d 750 (3rd Cir., 1978) (*en banc*), stay denied 439 U. S. 1360 (Sept. 1, 1978) (Brennan, J.), cert. denied (*sub. nom. Delaware State Board of Education* v. *Evans*) 48 U. S. L. W. 3697 (April 28, 1980).

In *Evans*, inter-district relief was mandated for Wilmington and New Castle County, Delaware (and since September, 1978 has been in effect) on findings strikingly similar in all material

respects to the findings in this case. These include a historic condition of *de jure* segregation in the central city district unremedied at the time of trial and compounded by:

a) governmental involvement in housing discrimination which excluded central city black students from attendance at suburban public schools; and

b) a State enactment posing barriers to desegregation not justified by any substantial non-racial purpose. See, e.g., 393 F. Supp. at 431-32, 438, 445, 447.

In their challenge to the District Court's findings, added defendants fail utterly to come to grips with the impact of *Evans* on their contentions. For example, in making much of the claims that specific effects have not been ascribed to the enactments surrounding Uni-Gov and that Uni-Gov would not have been enacted except for the school district exclusion (Lawrence Motion p. 9) defendants fail to note that precisely the same observations apply to Delaware's Educational Advancement Act which froze Wilmington's boundaries and limited the opportunity to remedy *de jure* segregation. See 393 F. Supp. 428, aff'd 423 U. S. 963 (1975). Obviously the Supreme Court is not bound by its summary affirmance and denials of review in *Evans* to give effect to that decision in future cases and the Court on a petition for review in this case will consider purported distinctions between the two cases.[7] But defendants'

7. In the most recent denial of review in *Delaware State Board of Education* v. *Evans,* 48 U. S. L. W. 3697 (April 28, 1980) three Justices dissented and a fourth, Chief Justice Burger, agreed that the case merited review, "but only when a full Court is available to consider the important issues presented by the petition for certiorari." The remedy in *Evans,* however, contained a feature, the dissolution of 11 independent school boards, which Mr. Justice Rehnquist regarded as "more Draconian than any ever approved by this Court." The holdings in this case required no such restructuring of local boards. Moreover, the test that added defendants must meet is likelihood that they will prevail, not likelihood that they will obtain review. *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 163 (1923);

(Footnote continued on next page.)

failure to deal with the single case most strikingly similar in its factual findings and conclusions of law does fatal damage to the legal justifications offered for seeking a stay pending appeal.[8]

2. The Equities Are Clearly Against the Issuance of a Stay

In assessing claims by a school authority that a stay of school desegregation order is necessary because immediate implementation would be infeasible or would cause disruption and harm, courts should be guided by the observation of Mr. Justice Marshall denying a stay request:

> Whatever progress toward desegregation has been made apparently, and unfortunately, derives only from judicial action initiated by those persons situated as perpetual plaintiffs below. The rights of children to equal educational opportunities are not to be denied, even for a brief time,

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(Footnote continued from preceding page.)
Meredith v. *Fair*, 306 F. 2d 374, 376-378 (5th Cir., 1962), cert. denied 371 U. S. 820 (1962). As noted, the Supreme Court has refused to issue stays permitting delays in the implementation of desegregation decrees even in situations where review has subsequently been granted by the Supreme Court itself. *Swann; Edgar; Jefferson Parish, supra* p. 6.

8. The only other case substantially relied on by added defendants is the Supreme Court's summary affirmance (48 U. S. L. W. 3732) of a decision by a three-judge court denying inter-district relief in Atlanta (Lawrence Motion p. 11). Among the major differences between the instant case and *Armour* v. *Nix*, C. A. No. 16708 (N. D. Ga., Sept. 24, 1979) are: 1) *Armour* unlike *Indianapolis* involved no claim of an inter-district boundary violation; 2) in *Armour* unlike *Indianapolis*, all districts had become unitary before any claim for inter-district remedy was raised (Mimeo. Op. pp. 6-7); and 3) while *Armour* contained findings of housing violations similar in some respects to those made here, the trial court concluded that the violations had ceased and that plainitff had failed to demonstrate continuing effects, indeed crediting countervailing evidence that current patterns of segregation were due to nonracial factors. Mimeo. Op. pp. 18-22.

> simply because a school board situates itself so as to make desegregation difficult. *Jefferson Parish School Board* v. *Dandridge*, 404 U. S. 1219, 1220 (1971).

Added defendants have presented no substantiation of their claim (Perry Motion p. 9) that implementation of the remedy will result in irreparable injury to Perry and the students transferred from IPS. In fact, the contentions of irreparable harm amount in substance to noncognizable claims of administrative inconvenience. Even these claims are refuted by two factors. First, as set forth by IPS in its Response to Motion for Stay filed with this Court on July 27, 1979, substantial steps had already been taken last year to prepare for desegregation and to assure a peaceful, orderly process. (IPS Response pp. 13-16). Since these steps have already been taken and there is far more time for preparation in 1980 than was available in 1979, there is no reason to suppose that the process cannot be completed in a satisfactory manner. Second, this Court has already indicated its extreme reluctance to delay intra-district relief beyond September, 1980 (Slip. Op. p. 28) and IPS has determined not to seek delay of such a plan regardless of the status of the inter-district remedy. If inter-district relief is delayed beyond September, 1980, it is probable that some IPS students will have to be reassigned in 1980 and reassigned again in 1981 when an inter-district remedy is implemented. Thus, far from alleviating administrative inconvenience, a delay in implementing the inter-district remedy would add to it.

Ranged against the amorphous claims of harm put forward by the added defendants is the injury that will be incurred by minority students if satisfaction of their constitutional rights is delayed for yet another year.

For the foregoing reasons, this Court should deny the motions of added defendants Perry and Lawrence Townships, et al., for stay pending the filing of a petition for writ of certiorari.

Respectfully submitted,

/s/ William L. Taylor
William, L. Taylor, Esquire
Center for National Policy
Review
Catholic University Law School
Washington, D. C. 20064
202/832-8525

John Wood, Esquire
Bramberger and Feibleman
45 North Pennsylvania Street
Indianapolis, Indiana 46204
Attorneys for Board of School Commissioners of the City of Indianapolis

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

May 29, 1980

Before

Hon. Thomas E. Fairchild, *Chief Judge*
Hon. Luther M. Swygert, *Circuit Judge*
Hon. .....

Nos, 78-1800, 78-1871, 78-1996 through 78-2006, 78-2039, 78-2221, 79-1831 through 79-1838, 79-1874 and 79-1875

United States of America,
Plaintiff-Appellee,

Donny Brurell Buckley and Alycia Marquese Buckley, etc.,
Intervening Plaintiffs-Appellees,

vs.

The Board of School Commissioners of the City of Indianapolis, Indiana, et al.,
Defendants-Appellants,

The Metropolitan School District of Perry Township, Marion County, Indiana, et al.,
Added Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 68-C-225

S. Hugh Dillin,
Judge.

This matter comes before the Court on the filing herein of the following documents:

1. "MOTION TO STAY MANDATE PENDING APPLICATION FOR CERTIORARI" filed herein on May 12, 1980 by the "Perry" added defendants-appellants.

2. "MOTION OF CERTAIN ADDED DEFENDANTS APPELLANTS FOR STAY OF MANDATE" filed herein on May 16, 1980.
3. "RESPONSE OF THE UNITED STATES TO MOTION OF PERRY TOWNSHIP TO STAY MANDATE PENDING APPLICATION FOR CERTIORARI" filed herein on May 16, 1980.
4. "RESPONSE OF INDIANAPOLIS PUBLIC SCHOOLS (IPS) TO MOTIONS OF ADDED DEFENDANTS PERRY AND LAWRENCE TOWNSHIP, ET AL., FOR STAY OF MANDATE" filed herein on May 22, 1980.

Certain defendants-appellants have requested this Court to stay the issuance of the mandate pursuant to our opinion filed April 29, 1980. Movants request that we stay only those portions of the mandate which would require the transfer of IPS students into non-IPS districts, which would require the hiring by the non-IPS districts of teachers rendered surplus in the IPS district, and which would require the adoption of in-service training programs by the non-IPS districts. With respect to these portions of our opinion, the issuance of the mandate is hereby stayed to and including June 30, 1980. As to all other portions of our opinion, the mandate shall issue forthwith.

Supreme Court, U. S.
FILED
SEP 25 1980
MICHAEL RODAK, JR., CLERK

No. 80-129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, *et al.*,
Cross-Petitioners,

v.

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, *et al.*,
Respondents.

CROSS-PETITIONERS' REPLY BRIEF

WILLIAM L. TAYLOR
Center for National Policy Review
Catholic University Law School
Washington, D.C. 20064
202/832-8525

JOHN WOOD
BAMBERGER AND FEIBLEMAN
45 North Pennsylvania
Indianapolis, Indiana 46204

Attorneys for Cross-Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-129

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, *et al.*,
Cross-Petitioners,

v.

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, *et al.*,
Respondents.

CROSS-PETITIONERS' REPLY BRIEF

ARGUMENT

All of the briefs in opposition (filed by the Lawrence and Perry school corporations, the United States and the Buckley intervenors)[1] focus less on the substance of the IPS claims for an inter-district remedy that matches the scope of the violation than upon an effort to cast doubt on the propriety of these issues being raised by school officials.

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[1] This reply brief is filed in response to the briefs in opposition of: The Metropolitan School District of Perry Township, Marion County, Indiana, et al. (hereinafter Perry Brief); The Metropolitan School District of Lawrence Township, Marion County, Indiana, et al. (hereinafter Lawrence Brief); United States (hereinafter United States Brief); and Donny Brurell Buckley, et al. (hereinafter Buckley Brief).

In that vein, several of the briefs note accurately that none of the other parties is seeking review of the adequacy of the remedy granted below (Perry Brief p. 9, United States Brief p. 18, n. 18) and the United States goes further by implying inaccurately (United States Brief p. 6) that only IPS challenged below the adequacy of a limited one-way remedy. In fact, the United States itself submitted in the district court that the most appropriate remedy would be a plan in which IPS annexed all or portions of the Marion County suburban systems, leaving the extent of suburban involvement in the first instance to IPS (JA 103-104). While the government may choose not to pursue its claim for broader remedy in this Court, the record cannot be revised to eliminate its prior support of a remedy being sought by IPS.[2] Similarly, it is hinted (Lawrence Brief p. 12, United States Brief p. 18, n. 18) that if the Buckley intervenors are not dissatisfied with the remedy ordered below, no one else should be. The fact, however, that the Buckley intervenors, a single black family, do not perceive themselves to be adversely affected by the one-way character of the relief hardly suggests that other minority students would not suffer discrimination.[3]

Most pertinent, this Court has recognized the central role of local school authorities in developing plans for

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[2] At the same time, it should be noted that the district court was not confined in its choices to an inadequate one-way plan and a plan for restructuring school districts. IPS preseated plans for the reciprocal transfer of students between city and suburbs that did not call for annexation or consolidation (JA 102-103).

[3] Although the Buckley intervenors alleged that they represented a class in seeking some form of inter-district relief, the class has never been certified. In the district court, IPS sought to present testimony by the head of the Indiana State Conference of branches of the National Association for the Advancement of Colored People (and President of the Indianapolis branch) as to the inequitable character of the one-way plan. The district court excluded the testimony.

the full implementation of constitutional rights, *Brown II*, 349 U.S. at 299, and has encouraged affirmative measures in the exercise of this role. See, e.g., *Swann* v. *School Board of Charlotte-Mecklenburg*, 402 U.S. 1, 16 (1971). Federal courts have frequently permitted local school officials to serve as plaintiffs in school desegregation cases in order to press claims against other parties whose involvement was necessary to secure a complete remedy. See, e.g., *Evans* v. *Buchanan*, 447 F.Supp. 982 (D.Del., 1978), *aff'd* 582 F.2d 750 (3rd Cir., 1978), *cert. denied* —— U.S. ——, 64 L.Ed. 2d 278 (1980); *Bradley* v. *School Board of The City of Richmond, Virginia*, 338 F.Supp. 67 (E.D. Va., 1972), *rev'd on other grounds*, 462 F.2d 1058 (1972), *aff'd by an equally divided court*, 412 U.S. 92 (1973). Indeed, it has been recognized that in some circumstances the interests of school officials and of the students they serve are so closely related that the former may assert not only their own rights to be free from interference in carrying out their desegregation obligations but the rights of black students as well. *Brewer* v. *Hoxie School District No. 46*, 238 F.2d 91, 104 (8th Cir., 1956). See also *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Truax* v. *Raich*, 239 U.S. 33 (1915); *Akron Board of Education* v. *State Board of Education of Ohio*, 490 F.2d 1285, 1289-90 (6th Cir., 1974), *cert. denied*, 417 U.S. 932 (1974). Accordingly, the vague suggestions of respondents that the merits of the cross-petition should not be examined because IPS lacks standing or somehow is an inappropriate party are totally without foundation.[4]

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[4] Perry respondents offer the additional novel idea that IPS somehow mooted its case by opposing stay applications of the interdistrict plan ordered below. (Perry Brief pp. 8-10). Under this theory, unsupported by the citation of any relevant authority, a party awarded compensatory damages but denied punitive damages would be estopped from appealing the denial of punitive damages if he opposed a stay of the award of compensatory damages. Cases do not become moot on appeal unless "an event occurs which renders it

On the merits, respondents' principal argument against review of the remedy is that the inequitable character of the one-way plan is mitigated fully by the fact that within IPS some white students are assigned to formerly black schools (United States Brief p. 18, n. 18, Buckley Brief p. 10). Underlying this contention is a misconception that the issue posed by cross-petitioners is one of numerical or proportional parity [5] and the erroneous notion that equity in the assignment of children to public schools is no more than a numbers game.

The fundamental inequity of remedy approved below is that it perpetuates the very kind of racially unequal treatment in public schools that gave rise in the first place to the desegregation litigation. In the words of Dr. Thomas K. Minter, former Superintendent of the Wilmington school system, quoted with approval in *Evans*

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impossible for this Court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever." *Mills* v. *Green*, 159 U.S. 651, 653 (1895). If Perry's point is treated as a waiver claim, parties, of course, are not deemed to have waived their rights unless it is clearly demonstrated that they intentionally relinquished a fundamental right. See, e.g., *Aetna Insurance Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937); cf. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). IPS did no such thing. In opposing a stay of what it regarded as partial relief, IPS carefully reasserted its contention that the remedy ordered was inadequate. (Perry Brief p. A14).

[5] Lawrence's notation (Lawrence Brief p. 12) that IPS' "preferred" plan "would have generally bused black students from their own districts nine years out of twelve" while busing white students only three years out of twelve is totally beside the point. The laws of mathematics inevitably result in racial groups which are a minority bearing a share disproportionate to their numbers of the reassignment burdens of any plan which calls for thorough desegregation. See *Evans* v. *Buchanan*, 582 F.2d 750 (3rd Cir. 1978), *cert. denied*, —— U.S. ——, 64 L.Ed.2d 278 (1980). The issue, rather, is whether the plan visits unequal treatment on minorities by *unnecessarily* taxing them with the burdens of reassignment.

v. *Buchanan*, 582 F.2d 750, 760-761, n. 7 (3rd Cir., 1978):

> In undoing the situation, if you put the burden of the remedy on those who have been victimized, it appears to me that the majority society is again putting the burden for—it's almost saying 'Go out and heal yourself' . . . [W]hen the burden is equally shared, it seems to me that it recognizes the duty of the total society to rectify a wrong, and not just the victims.

The "wrongs" in this case were inter-district violations that brought about the racial disparities that exist between city and suburban school districts. The demands of equity in the correction of these wrongs could hardly be met, as respondents suggest, by providing equity in the *intra*-district remedy. Respondents are wrong in their assertion (Lawrence Brief pp. 10-11) that the courts below have treated the inter-district and intra-district remedies as inextricably interrelated. In its most recent decision, the Court of Appeals said pointedly that "we can think of no reason why an intra-district plan should not be implemented in September, 1980, regardless of the status of the interdistrict remedy at that time." (JA 28).[6] To have ruled otherwise and dissolved the

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[6] Contrary to the claim of the Lawrence respondents (Lawrence Brief p. 11) that the district court "has refused until now to order complete intradistrict relief without interdistrict relief," the district court on August 18th ordered just such a plan, and the plan was implemented in September. Contrary to the claim of the United States (United States Brief p. 2, n. 3) the plan is in no way limited or contingent on further consideration by the parties, but provides for complete desegregation for all students except those who are slated to participate in the inter-district plan. The view of the Court of Appeals that intra-district remedy was not to await resolution of the inter-district issues is not new. The Court called for completion of the intra-district remedy in a 1974 opinion (503 F.2d 68, 80) and since then, has brought about completion of phases of the plan, e.g., complete desegregation of high schools within IPS, as rapidly as they were ready for implementation.

distinctions between inter- and intra-district violations could have placed the court in conflict with this Court's decision in *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

While the demands of equity for a reassignment plan which is fair and nondiscriminatory in its treatment of minority students may be tempered by other educational needs, respondents have failed to identify such needs. They do no more than point to the cursory references below to "generally better facilities in the outer districts" and the desirability of closing "obsolete schools" within IPS, references unsupported by any record evidence comparing IPS with other Marion County systems or by any other documentation. (See IPS Cross-Petition p. 10).[7]

Other purported justifications for the one-way plan are equally undocumented and even more remote. The United States' suggestion (United States Brief p. 18, n.18) that the limited remedy ordered below "may encourage residential movement across the line in either direction" is speculation built upon no evidentiary foundation and its notion that unfair or discriminatory burdens should be left for resolution by the courts at some unspecified future date runs counter to this Court's statement about the limited nature of the continuing role of federal courts after having ordered desegregation. See *Swann*, 402 U.S. at 31; *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976). Most important, any proposal to defer action on aspects of a reassignment plan that unfairly burden or discriminate against minority children totally ignores the standard

[7] Since this case began in 1968, IPS has closed twenty-nine elementary schools and a high school. In 1980 alone, IPS closed eleven elementary schools. Even if the record in 1973 disclosed a basis for concluding that existing IPS facilities were inferior to those in the suburbs, it would not provide a current justification for the one-way plan.

that desegregation plans must "promise to work realistically *now*." *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 439 (1968).

Respectfully submitted,

WILLIAM L. TAYLOR
Center for National Policy Review
Catholic University Law School
Washington, D.C. 20064
202/832-8525

JOHN WOOD
BAMBERGER AND FEIBLEMAN
45 North Pennsylvania
Indianapolis, Indiana 46204

Attorneys for Cross-Petitioners

see 915

see 79

2001

see 79

2067

seeds

see 80

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